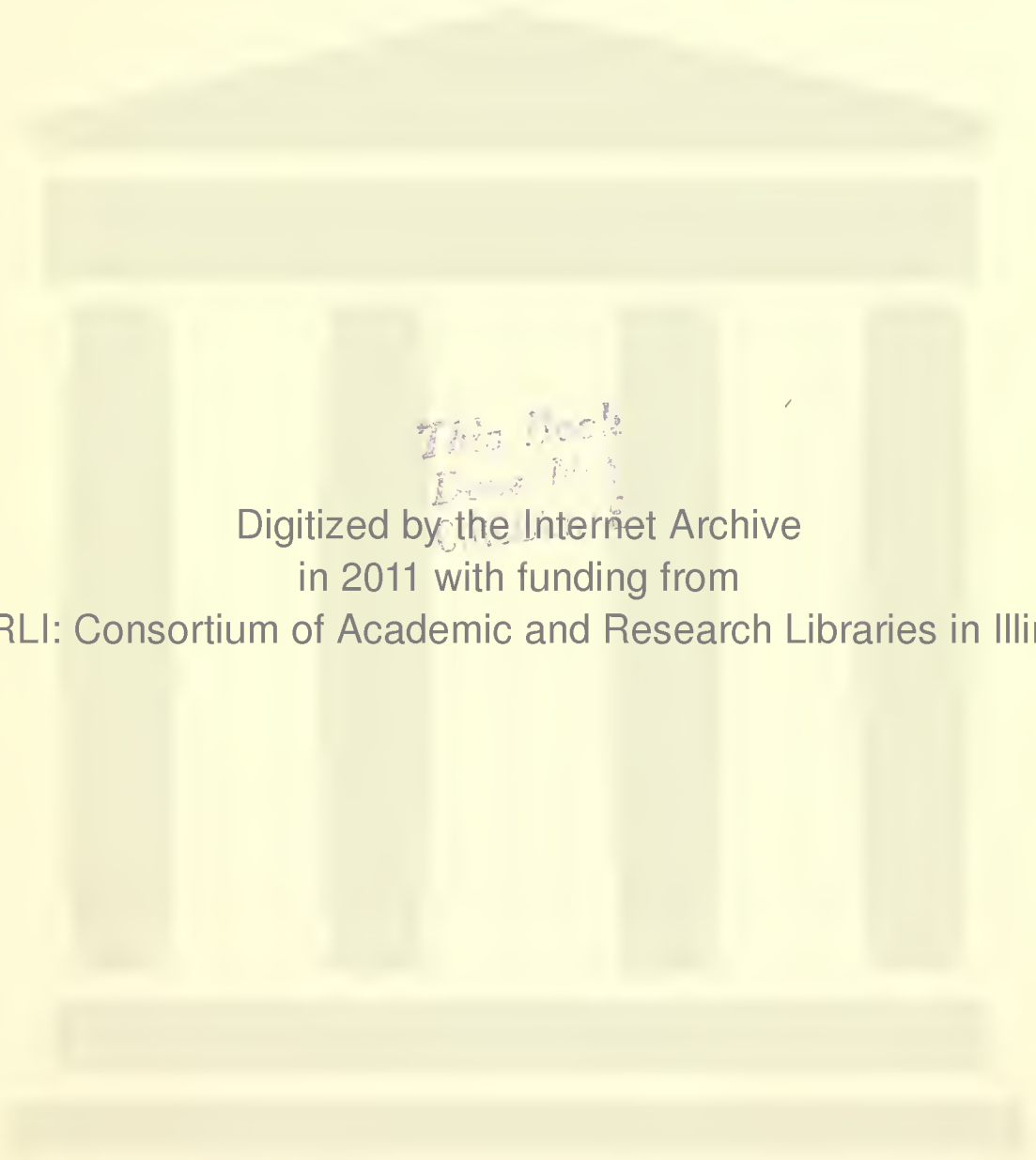


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STATE OF ILLINOIS
APPELLATE COURT
FOURTH DISTRICT

May Term, A. D. 1948

TERM NO. 48-F-9

AGENDA NO. 3

WILLIAM T. WINN; NORA WINN;
SADIE McDOWELL; NANNIE
SHUFFLEBARGER; and NONA
MATHENY,
Plaintiffs-Appellants,

vs.

AUGUSTA UNDERWOOD, per se; as
Widow of Manfred Underwood,
Deceased; and as Administratrix
of the Estate of Manfred Under-
wood, Deceased; FRANK KAMM;
W. B. GUARD; DORCIA STURGEON;
VIOLA LINDSEY; MILLARD UNDER-
WOOD; ADDIE MANN; EFFIE MILLER;
TRESSIE STELL; and JAMES ARTHUR
FREYLEY,
Defendants-Appellees.

Appeal from the

Circuit Court of

Hardin County.

335 I.A. 119

Scheineman, J.

This is an action brought by the heirs of Taylor Winn, as named in the title hereof, charging the defendants Manfred Underwood, Fannie Augusta Underwood (his wife), Frank Kamm and G. H. Guard with a trespass to real estate owned by said plaintiffs and the removal therefrom of certain fluorspar. Manfred Underwood died subsequent to the filing of the original complaint and thereafter, in an amended complaint, Fannie Augusta Underwood, as Administratrix of the estate of decedent and said decedent's heirs at law, as named in the title hereof, were added as parties defendant.

An appeal was taken from an order dismissing the complaint and this Court reversed and remanded the cause with instructions as reported in 325 Ill. App. 297.

Upon reinstatement of said cause a second amended complaint was filed and a trial was had before the Court without a jury. Judgment was entered in favor of the plaintiffs and against the

defendants, Fannie Augusta Underwood, per se, Frank Kamm, and G. H. Guard in the amount of \$800.00 together with costs. As to the other defendants judgment was entered in their favor. Plaintiffs appeal and assign as error that the damages awarded were wholly inadequate and that the judgment should have been against all the defendants. Defendants Fannie Augusta Underwood, per se, Frank Kamm and G. H. Guard cross appeal on the ground that the evidence is insufficient to warrant any judgment for plaintiffs.

The properties involved are those of the plaintiffs (Hereinafter called Winn property) consisting of approximately 14.78 acres and located north and west of a public road known as Cave-in Rock Road and those of defendant, Underwood, (hereinafter called Underwood property) consisting of approximately 15 acres and located east of said road. The Winn property and the Underwood property were immediately adjacent separated only by said road and enclosed by their respective fences running approximately paralleled with the road.

In July 1940 the Underwoods leased their property to Kamm and Guard and the latter conducted mining operations thereon from August until December 1940. During this time mining operations were also in progress on the Winn property. Both operations were conducted from separate shafts located on the respective properties and approximately 30 feet back from their respective fence lines. The two shafts were approximately 75 to 100 feet apart though not directly opposite to one another.

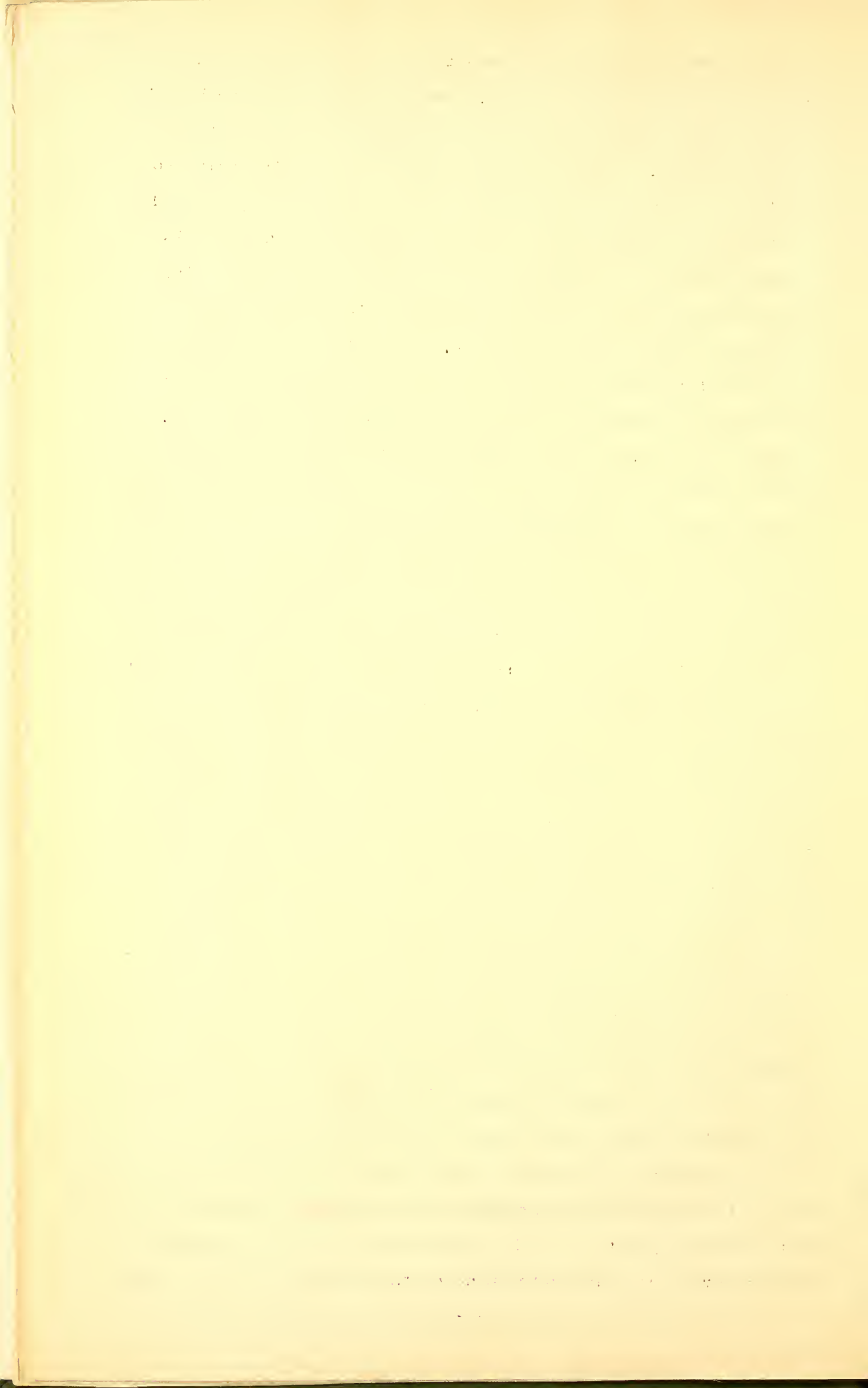
Plaintiffs presented several witnesses and exhibits in support of their contention that a trespass was committed. But a careful and candid consideration of the record brings us to the conclusion that the evidence so presented is wholly insufficient to sustain the judgment of the trial court in finding certain defendants guilty of a trespass. A brief resume of the evidence might well be stated here.

Plaintiffs offered in evidence the Winn deed and two plats, Exhibits A and B, purporting to show the boundary lines of



the respective properties and the extent of the mining operations conducted thereon. The said deed, executed in 1892, describes the Winn property as being in part all that land north and west of Cave-in-Rock Road. This description is of no probative value to plaintiffs' case unless at the time of the execution of the deed the Cave-in-Rock Road was at some other place than where it is presently located. Exhibit A shows the Underwood property line running parallel with the present road and, in fact, at the point in question, several feet west of it. In addition it shows a dotted line designated 'witness road' which road runs east of the present road and actually encompasses the Kamm and Guard shaft. If this 'witness road' were actually the road referred to as a boundary line in the Winn deed, then there would be no doubt that a trespass had been committed on Winn property from the very outset of sinking the Kamm and Guard shaft. However, the surveyor fails to mention the 'witness road' in his testimony and no information is elicited from him concerning the basis or grounds for its inclusion in his plat. With one exception the term 'old road' is used by the witnesses only in recalling conversations between Underwood and Winn in which they allegedly disputed the question of whether Winn's property was bounded by an 'old road' or the present Cave-in-Rock Road. The one exception and the only direct evidence on the question is the testimony of Fannie Augusta Underwood wherein she states definitely that she has known this road and the fences along it for 61 years, since she was 15 years of age, and in all that time there has been no change made in the location of the road at the place in controversy. Since the only competent testimony in the record shows that the present location of Cave-in-Rock Road has remained the same as it was at the time of the execution of the Winn deed, it is evident that the sinking of the Kamm and Guard shaft did not constitute a trespass.

Exhibit B. purports to show a sketch of Winn mining operations well within the Winn property. At the end of one of the drifts in said operations an X marks the spot where a wheelbarrow was discovered some time subsequent to the cessation of the Kamm



and Guard mining operations. The wheelbarrow is important to the plaintiffs' case in that it is their contention that it is the same wheelbarrow used by Don Randall, an employee of Kamm and Guard, when he was injured and that since it was not removed after the accident it marks the extent of the Kamm and Guard mining operations under the Winn property. If this wheelbarrow, together with a piece of overall allegedly found on it, were in any way linked with the said employee of Kamm and Guard it undoubtedly would be of great weight in supporting the fact of a trespass. However, neither the wheelbarrow nor the piece of overall was placed in evidence, though a somewhat indistinct picture of the wheelbarrow was introduced. No effort was made to identify the alleged piece of overall as being part of the overall of the Kamm and Guard employee. The engineer who made the plat was unable to state whether the point at which the wheelbarrow was found was in any way connected with or linked to the Kamm and Guard mining operations. The injured employee admits using a wheelbarrow and having a part of his overall torn off at the time of the accident but no effort is made to have him identify the wheelbarrow or the alleged piece of overall and he was unable to fix his location at the time of his injury. Several other witnesses recall seeing a wheelbarrow but no one of them identifies it or links it in any way with the Kamm and Guard mining operations. It is evident from the testimony of these witnesses that it is customary to use wheelbarrows in this type of mining, and also, that both properties have been mined previously and there are old workings throughout. On the basis of this evidence it would be pure conjecture to say that this unidentified wheelbarrow was the one used by the injured employee of Kamm and Guard and that, therefore, the location of its discovery marks the extent of the Kamm and Guard mining operations under the Winn property. A fact cannot be regarded as proved where the evidence merely gives rise to a conjecture or suspicion of its existence. Halowatsky v. Central Greyhound Lines,

Inc. 311 Ill. App. 127. Nor is proof of a mere possibility sufficient to establish a fact. O'Connor v. Aluminum Ore Co. 224 Ill. App. 613.

There is testimony of many sinkings and care-ins on Winn land, some of which run toward or from the Underwood property and the Kamm and Guard shaft. But in addition to evidence of previous mining operations conducted on the properties there is also evidence of a previous shaft having been used at the very location of the Kamm and Guard shaft so that it is entirely possible that the sinkings and care-ins may have resulted from such previous operations. A theory is not established by circumstantial evidence unless facts relied on are so related to each other that it is the only conclusion that can reasonably be drawn from them. O'Connor v. Aluminum Ore Co. (supra).

The evidence offered that the Winn shaft was 'shot in' is in no way linked to the Kamm and Guard operations. The fact that Kamm and Winn men could hear each other's workings underground is of no probative value. It is admitted that both properties were worked at and near their respective fence lines and that sounds can be heard underground at a distance up to 40 or 50 feet and no witness definitely located the places from which such sounds were heard. There is no evidence whatsoever to support the contention that Kamm and Guard mined in haste and even if there were, it would not establish a trespass. Nor do the alleged conversations between Underwood and Winn over the dispute as to boundary lines establish the fact of a trespass.

There is in the record practically no contradiction of any statement of fact by any of the witnesses. The only question is an interpretation of those facts relative to their value in establishing a trespass. This court is therefore placed in a much better position to evaluate the testimony of the various witnesses than in cases where there is a sharp controversy in the testimony and where the appearance and presence of the witnesses

while testifying are of more importance. While it is the rule that this court will not disturb the findings of the trial court unless manifestly against the weight of the evidence, yet where the evidence is clearly insufficient, this court will not hesitate to set such findings aside.

It has been held many times by the Supreme and Appellate Courts that where, from a consideration of the whole record, it is apparent that the evidence wholly fails to justify the judgment of the trial court, it is the duty of the reviewing court to reverse the decree. Roberts v. Cipfi, 313 Ill. App. 373; Leoni v. McMillan 287 Ill. App. 579; Sharkey v. Sesson 310 Ill. 98; Decoration Supply Corp v. Babka, 290 Ill. App. 293.

Where there is no evidence tending to support the verdict, a court of review may reverse a judgment without remanding it. DeMay v. Brew 317 Ill. App. 183.

For the reasons above stated the judgment of the Circuit Court against defendants Fannie Augusta Underwood, per se, Frank Kamm and G. H. Guard is reversed.

We do not feel it is necessary to pursue the inquiry further on the question of law relative to the liability of the other defendants for the reason that no trespass having been established there can be no liability against them in any event and the judgment of the Circuit Court in their favor is therefore affirmed.

Affirmed in part, and reversed in part.

Culbertson, P. J. and
Bardens, J. Concur.

(Not to be published in full)

FILED

MAY 25 1948

Stanley R. Brown

CLERK OF THE APPELLATE COURT
FOURTH DISTRICT OF ILLINOIS

Abstract

STATE OF ILLINOIS

APPELLATE COURT

THIRD DISTRICT

May Term, A. D. 1946

General No. 9580

Agenda No. 1

Audrey Wilson Grisson,
Plaintiff-Appellee,
vs.
Monte L. Goad,
Defendant-Appellant.)

Appeal from
Circuit Court of
Edgar County

183

Wheat, P.J.

335 I.A. 1201

Plaintiff-appellee Audrey Wilson Grisson obtained a judgment against defendant-appellant Monte L. Goad, for \$10,000, upon verdict by jury, for damages sustained in an automobile accident. Appeal follows denial of a motion for new trial and in arrest of judgment.

The undisputed facts are that plaintiff, age 24 years, on December 15, 1941, the date of the accident, was riding as a guest in an automobile driven by Thelma Stover Phipps, to her school-teaching duties near Brocton, Illinois. The car in which plaintiff was riding was proceeding north on Route 49, about 8:15 in the morning of a clear day, the pavement being dry. Route 133 extends in an east and west direction and intersects Route 49. Defendant was proceeding in his car easterly on Route 133 toward the intersection. A slow-sign was located on the east side of Route 49 south of the intersection and a stop-sign was located on the south side of Route 133 west of the intersection. The defendant did not see the other car until the instant of the crash,



11/27/20

TO THE HONORABLE
MEMBERS OF THE
HOUSE OF REPRESENTATIVES
WASHINGTON, D. C.

DEAR MR. SPEAKER:

I have the honor to acknowledge the receipt of your letter of the 11th inst. and in reply to inform you that the same has been forwarded to the proper authorities for their consideration.

G. A. L. 100

Very respectfully,
G. A. L.

Enclosed for the Committee on Education and Labor is a copy of a report of the Commissioner of Education, New York, dated June 1, 1920, and transmitted to the Committee on June 1, 1920.

The report contains a detailed statement of the progress of the work of the Department of Education, New York, during the year 1919-20, and also a statement of the work of the Department during the first six months of the year 1920-21.

The report is divided into two parts, the first of which contains a statement of the work of the Department during the year 1919-20, and the second of which contains a statement of the work of the Department during the first six months of the year 1920-21.

The report is a very valuable one, and it is hoped that it will be of great interest and value to the Committee.

which occurred in the intersection. Although assigned as error, any question as to the manifest weight of the evidence as to defendant's liability is waived, by reason of failure to present arguments on such point. It is noted that in reviewing the evidence, resulting in a verdict for plaintiff, in an earlier appeal (Goad v. Grissom, 524 Ill. App. 123), this Court said: "Clearly, the verdict was not contrary to the manifest weight of the evidence."

There remains the following alleged errors assigned by defendant, the first of which is that the Court erred in refusing to permit the photographer to identify plaintiff in all of certain motion pictures. Certain motion pictures were admitted in evidence, on behalf of defendant, and shown to the jury (and later to this Court), which were taken in March, 1945, for the purpose of indicating the then physical condition of plaintiff and her ability to walk. The Court permitted the photographer to identify plaintiff only in the first of the pictures and not in subsequent ones taken on different days, when plaintiff was clothed differently. The Court and jury had seen plaintiff in the court room for five days and needed no further identification of her in the pictures. This Court had no difficulty in identification, and we find no serious error in the ruling of the trial court, and particularly so as defendant then made no objection to the ruling of the Court.

It is next urged that the verdict of \$10,000 was excessive. In view of the evidence, the jury were warranted in returning a substantial verdict. On the first trial a verdict of \$6,000 was returned. On appeal, Justice Riess stated: "As to the amount of the verdict, if the plaintiff was entitled to recover at all, the proof would justify a

substantial verdict." (Go^a v. Grissom, supra). The question of damages is one of fact peculiarly for the jury and should not be disturbed unless clearly excessive or inadequate, indicating passion or prejudice on the part of the jury. The decline in the purchasing power of money has frequently been considered in determining the question. (Ford v. Friel, 330 Ill. App. 136). We cannot say that the verdict in this case is excessive so as to require a reversal.

Defendant next contends that the Court erred in denying a motion to withdraw a juror. When a witness for the defendant, Dr. Melvin Hole, was being cross-examined by Mr. Cotton, attorney for plaintiff, the following ensued:

"Q. But when they menstruate for two or three weeks at a time and then for only a week's recession or cessation over a period of years, would you say that was normal?

A. I wouldn't say that was quite normal. I would send her to one of the boys that do that kind of work. That girl needs something.

MR. COTTON: That'S what we think, too.

MR. MANN: I object to that remark.

THE COURT: Yes. The jury is instructed to disregard the last remark of counsel.

MR. MANN: I ask leave to withdraw a juror on that account, if the court please.

THE COURT: Overruled."

The remark of plaintiff's counsel was obviously improper but we believe not seriously prejudicial. It may be assumed that the jury recognized at all times that the attorney for plaintiff was acting as an advocate and, as such, believed that she was then ill and needed additional medical aid. The trial court instructed the jury to disregard the remark and did not err in refusing to withdraw a juror.

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Defendant further complains of plaintiff's given instruction as to damages, because it included the element of possible loss of future earnings, whereas it is claimed the evidence shows loss of but two or three days work since she resumed teaching after the accident. The pertinent part of this instruction is as follows: " And you may consider what, if any, effect such injuries may have upon her in the future in respect to pain and suffering or respect to her power to earn money by her labor." Her testimony was that after losing 4½ months of teaching at Brocton following the accident, she missed two days while teaching at Robinson in the school year beginning September, 1942; fifteen days while teaching at Charleston in the year beginning September, 1943; ten days at Charleston in the year beginning September, 1944; and one or two days at Charleston in the year beginning September, 1945. She discontinued teaching in June, 1946, it not appearing whether this was because of her physical condition or because of marriage and parental responsibilities. Testimony appears in the case that plaintiff's injuries were permanent and the jury was justified in adopting that view. The instruction embodied the element of preponderance of the evidence, and, as to possible loss of future earning, was qualified by the words "if any". We find no error in the giving of this instruction.

Finding no reversible error in the case, the judgment of the trial court will be affirmed.

Affirmed.

STATE OF ILLINOIS

APPELLATE COURT—THIRD DISTRICT

AT AN APPELLATE COURT, Begun and held for the Third District of the State of Illinois, at
Springfield, on the FIRST TUESDAY in MAY A. D. 19⁴⁸

PRESENT

335 I.A. 120²

HONORABLE HARRY E. WHEAT, Presiding Justice

HONORABLE FRANK H. HAYES, Justice

HONORABLE RALPH J. DADY, Justice

Attest: ROBERT L. CONN, Clerk.

BE IT REMEMBERED, that afterward, to-wit: On the 27th day of

MAY

, A. D. 19⁴⁸, there was filed in the office of the said Clerk of said Court,

an opinion of said Court, in words and figures following:

**Esther G. Perry, Appellant, vs. Glen R. Pitman and
Charles Kemp, Appellees.**

General No. 9591

MR. PRESIDING JUSTICE WHEAT delivered the opinion of the Court:

This is an action for damages sustained by plaintiff-appellant Esther G. Perry, on her complaint that her automobile struck a culvert as a result of a trailer being parked on the pavement. The tractor-trailer was owned by defendant-appellee Glen R. Pitman, and was driven by defendant-appellee Charles Kemp. The jury found the issues for defendants, and upon denial of a motion for a new trial, this appeal follows.

Upon the close of all the evidence the court granted a motion to withdraw from the jury consideration of the wilful and wanton counts in the complaint, leaving only the negligence counts, which ruling is assigned as error.

The evidence shows that the tractor-trailer, about 10 o'clock on the morning of February 21, 1945, had been proceeding west on Route 9 about 5½ miles east of Bloomington, Illinois; the paved portion of the highway was 18 feet in width with 8 foot dirt shoulders. The highway was practically level and straight for a considerable distance both east and west of the scene of the accident. It had been raining almost continuously all morning and was raining at the time of the accident. The shoulders of the highway were soft on top to a depth of about a half-inch, according to witnesses for plaintiff, and an inch or two according to defendant Kemp, the driver of the tractor. Several highway maintenance men testified that in draining water off of the highway that morning, they chopped ditches through the shoulders and found the ground frozen to a depth of 5 or 6 inches and that the ground was frozen to an unknown depth below that. The defendant driver testified that a tire blew out on the right inside dual wheel of the tractor and that the tire next to it was going flat. The tractor-trailer was stopped on the north half of the pavement entirely on the concrete, the tractor uncoupled from the trailer, and then driven to Bloomington, permitting the trailer to remain where it had stopped on the highway. The

trailer was of a van type, red in color, 22 feet long, 8 feet wide, 12 feet high; its empty weight was 7,000 pounds and its load of steel scrap weighed 22,270 pounds.

Shortly thereafter, the plaintiff was proceeding west on this highway, driving a Pontiac automobile. She is the only occurrence witness. She testified that it was misty and foggy, that she was going between 30 and 35 miles per hour as she approached the rear of the trailer, which she had seen for "some little distance" before she started to go around it; that when she realized the fact that it was not in motion, she turned to pass it on the south side when she was at a point 300 feet to the east of the trailer and 200 feet east of the culvert which was on the south side of the highway. Upon seeing a car coming from the west, she applied her brakes and the car skidded 200 feet across the south side of the pavement, across the south shoulder into a ditch and against the culvert. Her injuries were severe and she incurred medical expenses in about the sum of \$1,200 and for car repairs the sum of \$1,000. In view of her testimony as to seeing the trailer, the disputed question of visibility seems unimportant as does that concerning the placing of warning flags on the highway.

It cannot be said that the trial court erred in taking from the jury the wilful and wanton counts. Fine shades of distinction frequently distinguish between negligence and wilful and wanton misconduct, and such distinctions are better observed by the trial court who heard the testimony and who is cognizant of the "atmosphere" of the case, than by a reviewing court from the printed record.

It is next urged as error that the court admitted, over objection, testimony connecting defendants' activities in hauling scrap, with war work. While counsel for defendants was making his opening statement, the following ensued:

"MR. HAL STONE, SR.: We don't make any point about whether Mrs. Perry was injured or not, I mean physically. I have no doubt she was, but it is our theory these people were engaged in war work—

MR. COSTIGAN: We object, that is entirely immaterial 'being engaged in war work'.

MR. HAL STONE, SR.: I think it is quite material.

THE COURT: It may stand.

MR. HAL STONE, SR.: (Proceeding with opening statement.) He was engaged in work that made it imperative that they move their stuff along and not dump it over into a ditch.

MR. COSTIGAN: We object to that.

THE COURT: It is argumentative."

After these improper statements, defendants' Witness McKeown, traffic manager for defendant Pitman, was asked this question:

"Q. I guess you don't understand, let me ask you this, was this material being devoted to war work, were you supervised or inspected by any department of the government?

MR. COSTIGAN: We object on the grounds we don't believe that is material.

THE COURT: I suppose the question would be subject to criticism as being rather direct.

MR. STONE: Yes, it is.

MR. COSTIGAN: We are not objecting to it as to its form, we are objecting to it on the grounds that it is immaterial.

THE COURT: Answer.

THE WITNESS: We were directed by the government.

MR. STONE: That is all.

MR. COSTIGAN: I move that the answer be stricken.

THE COURT: Overruled."

The opening statement of counsel supported by the Court's ruling, coupled with the admission of this testimony was highly prejudicial to plaintiff. It may reasonably be inferred that due to the exigencies of the war effort, the jury believed that much was excusable which in times of peace would amount to negligence. This part of the opening statement and the supporting testimony constituted reversible error.

It is further assigned as error that defendant was permitted to introduce testimony as to whether it would be possible or good driving practice for defendant driver to move the trailer onto the north shoulder. The general manager of the Pitman Trucking Co., M. B. Harris, answered hypothetical questions, over objection, to the effect that it would be dangerous to pull the trailer with one tractor tire deflated, that "if it was very soft and slick on the berm, or the shoulder, I think he would be able to get the tractor off, but I believe as soon as the tractor was off he wouldn't be able to pull the trailer off if it was very slick."

“Q. I know, but I say, even if he could get it off, could he with safety take it off?

A. I don't think he could take it off, that is my opinion.

MR. WOLLRAB: I move that answer be stricken.

WITNESS: I think he could take the tractor off but he couldn't get the trailer off.

THE COURT: The objection will be overruled.”

Thereafter, on redirect examination, the following occurred:

“Q. Would any prudent man, or driver, attempt to pull 22,270 lbs. of steel with one blown-out tire and the other becoming flat——?

MR. WOLLRAB: We object, that is a matter for the jury to decide and not the witness in the case.

THE COURT: He may answer.

THE WITNESS: I would discharge a driver for doing it.

MR. WOLLRAB: We object and ask that the answer be stricken as being not responsive.

THE COURT: Yes.

MR. STONE: Your answer is, that a prudent man wouldn't do it?

MR. WOLLRAB: We object, that is leading.

THE COURT: He may answer.

THE WITNESS: Yes. A good driver wouldn't try it.”

This testimony concerned one of the essential issues in the case, that of the negligence of defendants, and was such a clear invasion of the province of the jury as to constitute reversible error.

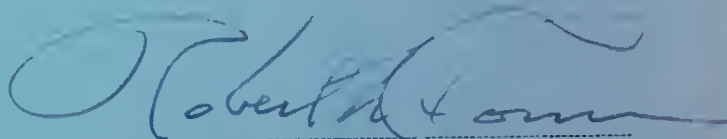
We find no serious error in the giving and refusing of instructions.

For the reasons given, the Court erred in not granting the motion for a new trial, and the cause is therefore reversed and remanded for a new trial.

REVERSED AND REMANDED.

I, ROBERT L. CONN, Clerk of said Appellate Court, do hereby certify the foregoing to be a true copy of the OPINION OF SAID COURT in said cause as the same appears from the records and files of my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and the seal of said Court,
at Springfield, Illinois, this 4th day of March 1961


Clerk Appellate Court, Third District.

OPINION

GENERAL NO. 9591

Esther G. Perry,

Plaintiff-Appellant,

vs.

Glen R. Pitman et al.,

Defendants-Appellees.

State of Illinois
APPELLATE COURT
Third District



44245

FREYN ENGINEERING COMPANY, a corporation,

Appellant,

v.

THOMAS HOIST COMPANY, a corporation,

Appellee.

APPEAL FROM
SUPERIOR COURT
COOK COUNTY.

335 I.A. 121

MR. JUSTICE LEWE DELIVERED THE OPINION OF THE COURT.

This is an action on a written contract to recover \$2,242.87 alleged to have been paid by plaintiff under the provisions of the Workmen's Compensation Act of the State of Utah, for injuries sustained by one of its employees and caused by the collapse of a hoist which plaintiff had leased from defendant. On defendant's motion the cause was dismissed. Plaintiff appeals.

The complaint alleged in substance that on November 13, 1942 the parties entered into a written contract which provided that defendant as lessor would rent to plaintiff as lessee certain construction equipment including a power-driven hoist, for the use of the plaintiff and its employees in certain construction work at Provo, Utah; and that the contract provides (Paragraph 3): "The equipment shall on delivery at the job site be in condition to render efficient, economical and continuous service, and shall be equipped with necessary and required safety devices."

The complaint further alleged that plaintiff accepted certain equipment furnished by the defendant under the terms of the contract, including a hoist; that plaintiff's employees proceeded to use the hoist for the purposes and uses for which it was designed and intended; that contrary to the provisions of the contract the hoist was in an unsafe and dangerous condition; that certain parts thereof, without the knowledge of the plaintiff,

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29 July 1961

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1944-1945: 1st Lt. William H. Smith, Jr. - 1st Lt. Fred W. Smith

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THE UNIVERSITY OF CHICAGO LIBRARY

had been previously broken and welded by the defendant; that the welding rendered the equipment inefficient, unsafe, and dangerous for the purpose for which it was rented to the plaintiff; that on the 18th day of June, 1943, by reason of its faulty, unsafe and inefficient condition it collapsed, causing a brick elevator operated by the hoist to fall and injure plaintiff's employee, one Beardall; that under the Workmen's Compensation Act of the State of Utah the plaintiff became legally liable to pay compensation and medical expenses to Beardall for the injuries sustained by him during the course of his employment by plaintiff; that on the second day of November 1944 the Industrial Commission of the State of Utah approved certain payments made to Beardall, and that all of those payments so made were required of plaintiff under the Workmen's Compensation Act of Utah and were the direct and proximate result of the breach of the contract between plaintiff and the defendant. A copy of the contract is attached to the complaint.

On January 25, 1946 defendant made a motion that the cause be dismissed, and for judgment against the plaintiff on the ground that the alleged cause of action as set forth in the complaint did not accrue to plaintiff within the time limited by law for the commencement of its action. Afterward an order was entered finding "that the damages claimed in this complaint are not recoverable under the contract therein alleged but said damages are recoverable only in an action which sounds in tort, and are barred by the statute of limitations" and dismissing the cause.

In this court defendant abandoned the position taken by it in the lower court and here contends that the complaint does not allege a cause of action on the contract involved.

Defendant now says that the complaint does not allege that the equipment when delivered at the job site was not equipped with the necessary safety devices and does not allege that

and has been previously broken and sealed by the defendant; and the
relying on the defendant's statement, which, the defendant
for the purpose for which it was sent to the plaintiff; that on
the 10th day of June, 1945, by reason of its faulty, unsafe and
inherent condition it collapsed, causing a brick elevator
operated by the motor to fall and injure plaintiff's employee,
one Corbally; that after the Corbally's death, the defendant
state of Utah the plaintiff became legally liable to pay compensa-
tion and medical expenses to Corbally for the injuries sustained
by him during the course of his employment by plaintiff; that on
the second day of November 1945 the Industrial Commission of the
state of Utah awarded certain benefits to Corbally, and
that all of these payments so made were required of plaintiff under
the Corbally's death certificate set at Utah and were the first and
exclusive result of the breach of the contract between plaintiff
and the defendant. A copy of the contract is attached to the
complaint.

On January 12, 1946 defendant wrote a letter that the
cause be dismissed, and for judgment against the plaintiff on
the ground that the alleged cause of action as set forth in the
complaint did not accrue to plaintiff within the time limited by
law for the commencement of the action. Afterward an order was
entered finding that the damages claimed in this complaint were
not recoverable under the contract between alleged but said
damages are recoverable only in an action which accrues in tort,
and are barred by the statute of limitations, and dismissing the
cause.
In this court defendant answered the motion filed by
it in the lower court and here contends that the complaint does
not allege a cause of action in the contract involved.
Defendant now says that the complaint does not allege
that the equipment was delivered at the job site and not equipped
with the necessary safety devices and does not allege that

plaintiff made inspections and tests before putting it into use. According to the allegations of the complaint, plaintiff accepted the equipment furnished by defendant, relying upon the terms of the contract, and that there was a hidden defect in the equipment known to defendant but unknown to plaintiff, which made the equipment unsafe.

Under the Civil Practice Act (Sec. 33, par. 3) pleadings shall be "liberally construed with a view of doing substantial justice between the parties." Section 42 (par. 2 and 3) provides that "if any pleading is insufficient in substance or form the court may order a fuller or more particular statement", and "no pleading shall be deemed bad in substance which shall contain such information as shall reasonably inform the opposite party of the nature of the claim or defense which he is called upon to meet."

With the adoption of the Civil Practice Act there has been a studied effort to abolish the so-called technicalities of common law pleading. (Crosby v. Weil, 382 Ill. 538; Anderson v. Bissman and Carrick Co., 287 Ill. App. 507; Weigend v. Hulsh, 315 Ill. App. 116.)

In the instant case we think the complaint states a cause of action and reasonably informs defendant of the nature of plaintiff's claim. If defendant desired a "fuller or more particular statement" it could have been obtained by motion under Section 42. Such a motion was not made. The sole ground urged by defendant in the trial court and upon which that court rested its decision is not before us. Moreover, none of the objections raised here was presented to the trial court for determination.

Defendant insists that the damages sought are not within the contemplation of the parties. We think defendant's contention is without merit. In Underground Construction Co. v. Sanitary District of Chicago, 367 Ill. 360, the court at page 369

plaintiff was investigated and facts before setting it into use.
According to the allegations of the complaint, plaintiff asserted
the defendant furnished by defendant, relying upon the fact of
the contract, and that there was a hidden defect in the equipment
known to defendant but unknown to plaintiff, which made the
equipment unsafe.

Under the Civil Practice Act (Sec. 32, par. 3) pleadings

shall be "liberally construed with a view of doing substantial
justice between the parties." Section 32 (par. 3 and 4) provides
that "if any pleading is insufficient in substance or form the
court may order a bill of particulars to be filed, and no
pleading shall be deemed to be in substance which shall contain
such information as shall reasonably inform the opposite party of
the nature of the claim or defense which he is called upon to meet."
With the adoption of the Civil Practice Act there has

been a studied effort to abolish the so-called technicalities of
common law pleading. (Griffin v. Hall, 235 Ill. 552; Winters v.
Winters and Central Co., 237 Ill. 420; Winters v. Winters,
215 Ill. 100, 115.)

In the instant case we think the complaint states a
cause of action and reasonably informs defendant of the nature
of plaintiff's claim. It certainly describes a "fact or facts
particular statement" as would have been obtained by motion under
Section 32. Such a motion was not made. The case ground urged
by defendant in the trial court and upon which that court rested
its decision is not before us. Moreover, none of the objections
raised here was presented to the trial court for determination.

Defendant insists that the motion court was not
within the contemplation of the parties. We think defendant's
contention is without merit. In Winters and Central Co. v.
Winters, 237 Ill. 552, the court at page 552

said, adverting to Hadley v. Baxendale, 5 English Ruling Cases 502, that "The damages recoverable for a breach of contract are such as may fairly and reasonably be considered as arising naturally -- that is, according to the usual course of things -- from the breach of the contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract as the probable result of the breach of it." To the same effect are Sanitary District of Chicago v. McMahon & Montgomery, 110 Ill. App. 510, and Deane v. Michigan Stone Co., 69 Ill. App. 106.

For the reasons assigned, the judgment is reversed, and the cause is remanded with directions to proceed in a manner not inconsistent herewith.

REVERSED AND REMANDED WITH DIRECTIONS.

BURKE, P.J. AND KILEY, J. CONCUR.

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44298

NORTH SIDE PURE ICE AND COAL
COMPANY, a corporation,

Appellee,

v.

BEATRICE CALL,

Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

335 I.A. 122

MR. JUSTICE LEWE DELIVERED THE OPINION OF THE COURT.

By this appeal defendant seeks to reverse a judgment in the sum of \$121 entered on the verdict of a jury in an action to recover the value of ten tons of coal alleged to have been sold and delivered by plaintiff to defendant. Defendant's motions in arrest of judgment and for a new trial were overruled.

The gist of the statement of claim is that on December 11, 1945, at the request of defendant, plaintiff delivered ten tons of coal of the value of \$121, which plaintiff refused to pay. In her affidavit of defense defendant denied that she ordered or received the coal here involved.

Defendant contends that plaintiff is barred from recovery because it failed to comply with certain requirements of ordinances of the City of Chicago pertaining to the weighing, sale and delivery of coal.

The only issue of fact raised by the pleadings is whether the coal was delivered to plaintiff. Rule 38, section 4 of the Municipal Court rules provides, inter alia, that "the facts constituting an affirmative defense such as * * * illegality, that an instrument or transaction is void or voidable in point of law, or cannot be recovered upon by reason of any statute * * * must be plainly set forth in the answer or reply." This rule is the same as subparagraph 4 of section 43 of the Civil Practice Act.

The record shows that defendant did not raise the question of the noncompliance with the city ordinance in her defense.

RECEIVED
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DEPARTMENT OF JUSTICE
 DIVISION OF INVESTIGATION
 WASHINGTON, D. C.

TO THE HONORABLE CLERK OF THE SUPREME COURT

My name is [redacted] and I am a resident of [redacted] State. I am writing this letter to you in order to request a judgment in the case of [redacted] in the matter of [redacted] and [redacted] in an action to recover the value of ten tons of coal alleged to have been sold and delivered by [redacted] to [redacted]. [redacted] motions to arrest judgment and for a new trial were overruled. The gist of the statement of claim is that on October 11, 1937, at the request of defendant, plaintiff delivered ten tons of coal of the value of \$150, which plaintiff refused to pay. In the affidavit of defendant's attorney dated [redacted] and the original of received the coal were involved.

Defendant contends that plaintiff is barred from recovery because it failed to comply with certain requirements of ordinance of the City of Chicago pertaining to the weighing, sale and delivery of coal.

The City of Chicago Ordinance No. 100, Chapter 4, Section 4, provides that coal may be delivered to plaintiff. This Ordinance is of the same effect as the Ordinance of the City of Chicago, Illinois, which was amended on September 1, 1937, to read: "No person shall deliver or transport by rail or vehicle in bulk any coal, or attempt to recover any coal, unless he has first obtained a license from the City of Chicago, Illinois, and has paid the fee thereon." This Ordinance is the same as paragraph 4 of Section 4 of the Civil Practice Act. The record shows that defendant did not obtain the license of the municipality with the city ordinance in her defense.

Moreover, no mention was made by defendant of the alleged failure of the plaintiff to comply with the city ordinance, relating to the weighing, sale and delivery of coal, during the trial, nor did defendant make any attempt to amend her pleadings. Plaintiff's alleged failure to comply with the city ordinance is an affirmative defense, and since this defense was not stated in her affidavit of defense she could not avail herself of it. (Parker v. Dameika, 372 Ill. 235; Ballard v. Trainor, 285 Ill. App. 509; Clinton Co. v. Stiles, 197 Ill. App. 505.)

Defendant maintains that the verdict is against the manifest weight of the evidence. She says that the testimony of plaintiff's witnesses is incredible. Four witnesses testified in behalf of the plaintiff. Two truck drivers, Gore and Covington testified that they delivered the coal and remembered that a delivery ticket was signed by defendant. Two other witnesses called in behalf of the plaintiff, one Pedretti and one Goldstein, testified in substance that they called on defendant to collect the coal bill and that defendant promised to send the money.

Plaintiff, testifying in her own behalf, was corroborated by her janitor, one Cunningham. The testimony of plaintiff's witnesses was diametrically opposed to that of defendant's witnesses.

On the record before us we cannot say that the verdict is against the manifest weight of the evidence. The trial court and jury who heard and saw the witnesses were in a better position than this court to determine the weight of the testimony and the credibility of the witnesses. (Miller v. Cummings, 323 Ill. App. 297; Elmore v. Cummings, 321 Ill. App. 234; Philpott v. Parham, 316 Ill. App. 278.)

For the reasons assigned, the judgment is affirmed.

JUDGMENT AFFIRMED.

BURKE, P.J. AND KILEY, J. CONCUR.

44309

CHERIE H. TRUMBLY,

Appellant,

v.

CITY OF CHICAGO, a Municipal
Corporation,

Appellee.

APPEAL FROM

CIRCUIT COURT

COOK COUNTY.

3351A. 122²

MR. JUSTICE LEWE DELIVERED THE OPINION OF THE COURT.

This is an action to recover damages alleged to have been sustained by the plaintiff when she slipped and fell upon an icy sidewalk in front of the premises commonly known as 353 West 63rd Street in the City of Chicago. At the close of all the evidence the court instructed the jury to find the defendant not guilty, and entered judgment accordingly. Plaintiff appeals.

The essential facts are uncontroverted. About 7:30 p.m. on January 17, 1945 plaintiff while walking west on the south side of 63rd Street slipped and fell, causing the injuries here complained of.

At the place where the plaintiff fell the sidewalk was twelve feet wide and covered with snow and ice which had accumulated for several weeks before the occurrence. Near the curb the snow was banked two or three feet high. At the time of the accident plaintiff was walking north of the center line of the sidewalk, where the ridges or hillocks were six or seven inches deep, according to her testimony. This condition was caused by the snow being trampled upon by pedestrians and alternate thawing and freezing for a period of several weeks before plaintiff fell. So far as the record shows, the accumulation of the snow and ice at the place where plaintiff fell was the result of natural causes.

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Under these circumstances there can be no recovery (Strappelli v. City of Chicago, 371 Ill. 72; Casper v. City of Chicago, 320 Ill. App. 269), and the court properly instructed the jury to find the defendant not guilty.

For the reasons assigned, the judgment is affirmed.

JUDGMENT AFFIRMED.

BURKE, P.J. AND KILEY, J. CONCUR.

Under these circumstances, it is respectfully
(Shirley v. City of Chicago, 171 Ill. 73; Barber v. City of
Chicago, 170 Ill. 403), and the court properly instructed
the jury as to the relevant facts.
For the reasons assigned, the judgment is affirmed.
JUDGMENT AFFIRMED.

CHIEF JUSTICE, J. L. ANDERSON, J. C. BROWN, J. D. HARRIS, J. E. HARRIS, J. E. HARRIS.

44369

JACK KOLE, DORIS KOLE and JOE
D. GRANT,

Appellees,

v.

SEILIG B. KOUSNETZ,

Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

335 I.A. 123

MR. JUSTICE LEWE DELIVERED THE OPINION OF THE COURT.

This is an action in forcible detainer for possession of the third floor apartment in a three-flat building located at 5749 North Spaulding Avenue in the City of Chicago, Illinois. There was a finding and judgment in favor of plaintiffs. Defendant appeals.

The evidence shows that the premises involved were purchased by plaintiffs in August, 1947; that defendant occupied the premises under a two-year written lease commencing May 1, 1945; that on February 22, 1947 the former owner, plaintiff's grantor, served a written notice upon the defendant, informing him that upon the expiration of the lease (April 30, 1947) defendant would be regarded as a month to month tenant.

The evidence further shows that on August 28, 1947 plaintiffs served a written notice upon defendant, stating that his tenancy would terminate on the 30th day of September 1947, and that plaintiffs Jack and Doris Kole "desire possession of the premises in which you (defendant) reside, in good faith for their immediate use and occupancy under section 209(a) (2) of the Housing and Rent Act of 1947," and that at the time of the trial of the instant suit plaintiffs were defendants in a forcible entry and detainer proceeding in the Municipal Court of Chicago for possession of the premises which plaintiffs now occupy.

STATE OF NEW YORK
IN SENATE
JANUARY 1, 1947

REPORT

OF

THE COMMISSIONERS OF THE LAND OFFICE

IN RESPONSE TO A RESOLUTION

8881.1.123

THE COMMISSIONERS OF THE LAND OFFICE have the honor to acknowledge the receipt of a letter from the Honorable Mr. J. B. ... dated ... and in reply to inform you that the same has been forwarded to the proper authorities for their consideration. The Honorable Mr. J. B. ... has been advised of the same and will be kept advised of the progress of the same.

The Honorable Mr. J. B. ... has been advised of the same and will be kept advised of the progress of the same. The Honorable Mr. J. B. ... has been advised of the same and will be kept advised of the progress of the same. The Honorable Mr. J. B. ... has been advised of the same and will be kept advised of the progress of the same.

The Honorable Mr. J. B. ... has been advised of the same and will be kept advised of the progress of the same. The Honorable Mr. J. B. ... has been advised of the same and will be kept advised of the progress of the same. The Honorable Mr. J. B. ... has been advised of the same and will be kept advised of the progress of the same.

Defendant contends that plaintiffs failed to prove that they sought in good faith to recover possession of the premises in controversy.

Henry B. Sprecher, husband of plaintiffs' grantor, testified that at the time of the consummation of the sale of the premises here in question he obtained a three-year written lease from the plaintiffs Kole and Grant for the second floor apartment and that there was some discussion between the witness and plaintiff Kole about "changing flats" after the defendant was evicted; and that the building was sold to plaintiffs because the witness intended "to go some time to California but did not know what month or year he was going to leave."

Defendant argues that in order to recover possession of his apartment it is incumbent upon the plaintiffs Jack and Doris Kole to show that they desired this particular apartment for their own immediate and personal use and occupancy. We think defendant's position is untenable.

After plaintiffs acquired title to the premises they had a right to make a choice as to which apartment they would occupy. (Nofree v. Leonard, 327 Ill. App. 143.) They chose the apartment occupied by defendant.

Since Sprecher had no definite plans as to when he was going to California, he obtained a three-year lease from plaintiffs as a condition of the sale of the premises, in order to assure himself living quarters. Under the terms of this lease Sprecher can remain in possession of the apartment he now occupies for three years. The fact that one of the plaintiffs Kole merely discussed with the Sprechers an exchange of apartments some time in the future does not bar plaintiffs from recovering possession of defendant's apartment, in the instant suit.

testimony contains that plaintiff failed to move

from that house in good faith to recover possession of the

premises in controversy.

That is, plaintiff, because of plaintiff's failure,

failed that at the time of the conversation of the wife of

the witness here in question he obtained a photograph which

shows from the plaintiff's side and went for the second floor

apartment and that there was some discussion between the witness

and plaintiff's wife about "renting this" after the defendant

was visited; and that the witness was told to plaintiff's house

the witness intended "to go down there to California City and

know what would be done by the time he leaves."

Defendant argues that in order to recover possession

of his apartment it is incumbent upon the plaintiff to show

that he is now that they desired this particular apartment

for their own immediate and personal use and occupancy, he

shows defendant's position is untenable.

After plaintiff admitted title to the premises they

had a right to make a lease or to which defendant they would

consent. (Holt v. Holt, 107 Cal. 144, 145.) They were

the apartment owned by defendant.

These premises had no leasehold claim as to when he was

going to California, he obtained a photograph from plaintiff

after he a permission of the wife of the defendant, in order to

show that living separate. Under the terms of said lease

between the parties in possession of the apartment he was obligated

for three years. The first part of the plaintiff's wife would

disagree with the defendant as evidence of apartment was then

in the future that was not plaintiff's from recovering possession

at defendant's apartment in the instant suit.

We think the evidence amply justifies the finding that plaintiffs sought in good faith to recover the premises in controversy for their immediate and personal use.

Defendant contends that the notice to terminate the year to year tenancy was insufficient and that the Federal Housing and Rent Act of 1947 does not apply where the property is a multiunit owned by two or more persons. Neither of these questions was raised in the trial court and therefore we shall not consider them. (Thomas v. Bourdes, 327 Ill. App. 197; Hodenkirk v. State Farm Mutual Auto. Ins. Co. 325 Ill. App. 421.)

For the reasons assigned, the judgment is affirmed.

JUDGMENT AFFIRMED.

BURKE, P.J. AND KILEY, J. CONCUR.

44241

EDWARD E. WILLIAMS, Donor of "The
Edward E. Williams Trust", a Trust,
and Elizabeth Meidell,

Appellees,

v.

ARTHUR J. STEVENS, as Trustee,

Appellant.

APPEAL FROM

CIRCUIT COURT

COOK COUNTY.

3351.A. 123¹²⁹⁰

MR. JUSTICE KILEY DELIVERED THE OPINION OF THE COURT.

This is an action in chancery to compel a trustee to convey the trust res to a third party. The chancellor entered summary judgment for plaintiffs and the defendant-trustee has appealed.

The trust property consists of a lot and a five room bungalow at 4062 North Kostner Avenue, Chicago, Illinois. It was acquired by donor in 1932 from George and Katherine Stevens, parents of the trustee. In 1938 donor conveyed the property in trust to defendant, as trustee, and entered into a contemporaneous trust agreement with him. At donor's death, subject to limitations in the agreement, the property was to go to the trustees two children or the survivor of them, and should both such children be dead, the trustee and his wife or the survivor. In 1937 the donor had engaged plaintiff, Elizabeth Meidell to care for him and to maintain his home, the bungalow. In October 1946, the donor twice gave written directions to the trustee to convey the property to Elizabeth Meidell. The trustee refused to do so and this suit followed.

The pertinent provisions of the trust agreement are: In paragraph 3, that the donor during his lifetime shall have management and control of the real estate and the selling thereof; that

THOMAS E. WILLIAMS, Trustee of the
Edward E. Williams Trust, a Trust,
and Elizabeth Williams,

Plaintiffs,

vs.
ANTHONY A. WILLIAMS, a Trustee,
Defendant.

CASE NO. 10-21

IN THE CIRCUIT COURT OF THE
SEVENTH JUDICIAL CIRCUIT IN AND FOR
THE COUNTY OF DADE, FLORIDA.

3331A.138

1. This is an action to determine the validity of the will of
EDWARD E. WILLIAMS, deceased, and to set aside the same. The
decedent was a resident of the County of Dade, State of Florida,
at the time of his death. He was married to ELIZABETH WILLIAMS,
deceased. They had three children, namely: THOMAS E. WILLIAMS,
deceased; ANTHONY A. WILLIAMS, deceased; and EUGENE E. WILLIAMS,
deceased. The decedent was a member of the Episcopal Church.

2. The first property consisted of a lot and a five room
dwelling at 1005 North Eastern Avenue, Chicago, Illinois. It
was acquired by decedent in 1922 from George and Catherine Brown,
owners of the premises. In 1925 decedent conveyed the property in
trust to defendant, as trustee, and entered into a partnership
agreement with him. At decedent's death, subject to limitations
in the agreement, the property was to go to the trustee and
children of the survivor of them, and should both such children
be dead, the trustee and his wife or the survivor. In 1927 the
decedent had executed a will, Elizabeth Williams to care for his and
to maintain his home, the dwelling. In October 1928, the decedent
twice gave written directions to the trustee to convey the property
to Elizabeth Williams. The trustee refused to do so and this suit
followed.

3. The defendant provisions of the trust agreement are: In
paragraph 1, that the donor during his lifetime shall have manage-
ment and control of the real estate and the selling thereof; that

the donor shall have no duty to account to the trustee for the proceeds of any sale; that the trustee during the lifetime of the donor shall deal with the real estate only when authorized to do so in writing by the donor and will, on written direction of the donor, make deeds for or otherwise deal with the title to such property, provided the trustee should not be required to deal with the title so long as any money is due him under the trust agreement; in Paragraph 4, that, during the existence of the trust, should the real estate be sold, the proceeds should be paid to the trustee to be held for the purposes of the trust; in Paragraph 7, that the agreement and trust should be irrevocable and that the donor could not by act or direction revoke the agreement or trust; and in Paragraph 10, that reasonable compensation should be paid to the trustee for services rendered in connection with the trust.

The complaint alleged that donor was persuaded without consideration to make the trust conveyance and agreement; that it was the donor's desire and intention to convey to Elizabeth Meidell for a valuable consideration; and that there was no money due the trustee under the trust agreement. It alleged the donor's right under Paragraph 3 of the trust agreement to dispose of the property. The trustee's motion to strike was denied and the trustee answered. The answer denied that Williams, the donor was persuaded to make the trust conveyance without consideration, and averred that the donor requested the property placed in trust as a protection against the influence of Elizabeth Meidell; that the proceeds of the sale were not offered to the trustee; that the conveyance sought, if made, would revoke the trust contrary to the provisions of the agreement; that the donor was not acting freely but was under the influence of Elizabeth Meidell; and that there is money due the trustee for advancements.

the donor shall have no duty to account to the trustee for the proceeds of any sale; that the trustee during the lifetime of the donor shall deal with the real estate only with authority to do so in writing by the donor and will, on written direction of the donor, make such use of the proceeds as he may think fit to make; provided the trustee should not be required to deal with the title so long as any money is due him under the trust agreement; in paragraph 4, that, during the lifetime of the donor, should the real estate be sold, the proceeds should be paid to the trustee to be held for the purpose of the trust; in paragraph 5, that the donor and trustee should be irrevocable and that the donor could not by act or direction revoke the agreement or trust; and in paragraph 10, that reasonable consideration should be paid to the trustee for services rendered in connection with the trust.

The complaint alleged that donor was compelled without consideration to make the trust conveyance and agreement; that it was the donor's belief and intention to carry out Elizabeth's will for a valuable consideration; and that there was no money due the trustee under the trust agreement. It alleged the donor's right under paragraph 5 of the trust agreement to dispose of the property. The trustee's motion to strike was denied and the trustee answered. The answer denied that William, the donor was compelled to make the trust conveyance without consideration, and averred that the donor received the property placed in trust as a protection against the influence of Elizabeth Keightley; that the proceeds of the sale were not offered to the trustee; that the conveyance would, if made, would revoke the trust contrary to the provisions of the agreement; that the donor was not acting freely but was under the influence of Elizabeth Keightley; and that there is money due the trustee for services.

Thereafter plaintiffs moved for a summary judgment and in support of the motion filed the affidavits of the plaintiffs. In the affidavit of Elizabeth Meidell it is stated that since 1937, she acted as housekeeper, nurse, cook and laundress for donor; that she received no payment for services which were worth \$10,000, and that she was agreeable to accepting the house in full payment. Donor's affidavit stated that originally he held the property in trust as security for a debt of the trustee's father and accepted a conveyance in satisfaction of the debt; that while intoxicated he was induced to deed the property in trust to the defendant trustee; that Elizabeth Meidell rendered the services stated in her affidavit; that he is unable otherwise to pay her and freely desires and intends to convey the property in payment; and that he is willing to make any payments due the trustee. Attached to this affidavit are the trust, release, and warranty deeds and the promissory note, evidencing the transaction between trustee's father and the donor with respect to the real estate. The instruments bear the recorder's stamp.

The trustee moved to strike the affidavits and the motion and affidavits. This motion was denied and the trustee and his attorney of record filed counter affidavits. By so doing the objection to the form of the proceeding was waived. No complaint is made of the filing of the affidavit by the attorney of record. These affidavits state that the attorney represented the trustee's father in a meeting at the attorney's office attended by trustee's father and Williams; that the trustee's father agreed to forbear legal proceedings against Williams and to the latter's retention of the property during his life in consideration of William's conveying the property in trust to the defendant trustee; that the deed in trust and trust agreement were prepared by the trustee's

...the plaintiff moved for a summary judgment and in support of the motion filed the affidavit of the plaintiff. In the affidavit of the plaintiff it is stated that since 1937, she acted as executrix, nurse, cook and landlady for her father; that she received no payment for services which were worth \$10,000, and that she was responsible to her father in full payment. The plaintiff stated that originally she held the property in trust as executrix for a debt of the father's father and accepted a conveyance in satisfaction of the debt; that while interested in the property she had the property in trust to the defendant; that the plaintiff stated that the father was not a party to the conveyance and that he is unable otherwise to pay her and freely desires the income to convey the property in payment; and that he is willing to make any payment for the trustee. Attached to this affidavit are the trust, release, and certain deeds and the executory note, evidencing the transaction between the father and the donor with respect to the property. The plaintiff says the father's name. The trustee moved to strike the affidavit and the motion was denied. This motion was denied and the trustee and the plaintiff. The trustee moved to strike the affidavit. By an order the court granted the motion to strike the affidavit. In coming to the decision in the form of the proceedings, the court is of the opinion that the filing of the affidavit by the attorney of record, that the affidavit states that the attorney represented the trustee's father in a matter of the father's estate, and that the father's father and the plaintiff; that the father's father agreed to convey legal possession of the property to the plaintiff's father and the plaintiff; that the father's father agreed to convey the property to the plaintiff in satisfaction of the father's debt; that the father's father agreed to convey the property to the plaintiff in satisfaction of the father's debt; that the father's father agreed to convey the property to the plaintiff in satisfaction of the father's debt.

attorney which documents were examined and approved by Williams; that Williams at the time was not intoxicated and made the agreement and conveyance freely; that prior to the instant suit Williams sought to persuade the trustee to permit Elizabeth Weidell to remain on the trust premises for her life, after the death of Williams; that Plaintiff Weidell and her husband had been provided room and board by Williams for several years in payment of her services; and that the trustee had advanced money to Williams.

The decree found the equities were with the plaintiffs and sustained the motion for a summary judgment, and found that under the terms of the agreement the trustee was required to make the conveyance; that the donor was indebted to Elizabeth Weidell in excess of \$10,000; and that she had agreed to accept and the donor had agreed to cause the conveyance to be made in full discharge of the debt. It ordered the donor to pay the trustee \$607.75 the amount claimed by him for advancements and fees and ordered the trustee to make the conveyance.

We shall not consider points and arguments bearing on the intention of donor and trustee in making the trust agreement. We think it is unnecessary to determine the question of intention. The question is whether the donor reserved the right to direct the trustee to make the conveyance sought. It is admitted by the trustee that this power was reserved but it is claimed the power is limited in that the donor was required in such an event to deliver the proceeds of the sale to the trustee. There is an ambiguity in the agreement as to the proceeds. It is irrelevant here, however, since there is no dispute that there will be no proceeds. The conveyance, if made, will be for consideration of past services. We think it is plain from a reading of the instrument that the donor had the power to direct the sale and the trustee under the instrument is required to follow the direction.

attorney, which documents were retained and approved by Williams; that
Williams at the time was not interested and made the agreement and
conveyance freely; that prior to the instant sale Williams sought to
procure the notes to permit Williams to remain on the
land premises for his life, after the death of Williams; that
Williams desired and had secured the same in order to keep and hold
by Williams for several years in payment of her services; and that
the transfer had advanced some to Williams.

The parties found the parties were with the plaintiffs and
examined the notes for a known purpose, and found that notes and
some of the proceeds of the notes had been used to make the con-
veyance; that the transfer was intended to transfer Williams in possession
of \$10,000; and that the said notes to secure the same had been
in order the conveyance to be made in full payment of the debt.
It entered the donor to pay the transfer \$100.00 the amount claimed
by him for expenses and fees and ordered the transfer to make the
conveyance.

It shall be necessary to state and arguments bearing on the
material of notes and debts in making the first agreement. It
shall be necessary to determine the question of intention.
The question is whether the donor retained the right to direct the
transfer to make the conveyance complete. It is stated by the
transfer that this note was retained but it is claimed the donor
is satisfied in that the donor was retained in such an event to
deliver the proceeds of the sale to the donee. There is an
obligation in the agreement to do the proceeds. It is presumed
that, however, since there is no claim that there will be no
proceeds. The conveyance, it is said, will be the consideration of
the transfer. We think it is plain that a transfer of the proceeds
that the donor had the donor is direct the sale and the transfer
under the instrument is retained to follow the direction.

We see no merit to the contention that the summary judgment should not have been entered because there were disputed issues of fact. An issue of fact to preclude summary judgment must be of a relevant matter. The issues made by the affidavits are whether there is a valuable consideration moving from Elizabeth Meidell for the conveyance and whether the trustee had advanced money to the donor. The issue as to consideration is not relevant to the question presented to the trial court. As to the issue of advancements by the trustee, the trial court ordered the donor to pay the total amount specified by the trustee. We see no reason for complaint in this respect.

The trustee is in no position to claim that he was not allowed reasonable compensation under the agreement. The court granted whatever was asked by the trustee. It should be noted that the trustee's refusal of tender in nowise prejudiced him, for the court provided that the allowance should be a first lien against the property.

The summary judgment was proper and it is hereby affirmed.

AFFIRMED.

BURKE, P.J. AND LEWE, J. CONCUR.

44332

AXEL GIDLOF,

Appellant,

v.

GEORGE G. GROSSER,

Appellee.

APPEAL FROM

CIRCUIT COURT

COOK COUNTY.

335 I.A. 124

MR. JUSTICE KILEY DELIVERED THE OPINION OF THE COURT.

This personal injury and property damage action was begun by Axel Gidlof June 13, 1946. George Grosser joined issue and, subsequently, in the Municipal Court sued Gidlof for damages. Both actions arose out of a collision between automobiles driven by Gidlof and Grosser. On Gidlof's motion the Municipal Court case was transferred and consolidated with the Circuit Court action. The consolidation order did not specify the arrangement of the parties in the consolidated action. The case was tried before a jury and the verdict found "defendant Axel Gidlof" guilty and assessed the "plaintiff George Grosser's" damages at the sum of \$548.75. The judgment was for plaintiff George G. Grosser and "against" the "defendant Axel Gidlof." Gidlof has appealed as plaintiff and Grosser in his brief refers to himself as defendant. In this opinion we shall refer to the parties by their proper names.

The collision occurred April 14, 1946 in the intersection of Halsted Street and Wellington Avenue, Chicago, at about 3:00 A.M. Gidlof was driving north on Halsted Street and Grosser was driving east on Wellington. After the collision Grosser's automobile rested on its right side near the northeast corner of the intersection and Gidlof's car faced in an easterly direction. There were "Slow" signs at the time of the accident on Halsted

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Street south of the intersection and on Wellington Avenue west of the intersection. The damage to Gidlof's car was mainly to the left front and to Grosser's car mainly to the right center.

The record shows that at Gidlof's request the case was advanced from its regular place on the trial calendar and set for December 2, 1946. It was called December 2, 1946 and set for trial for January 23, 1947. At Gidlof's request the case was continued until January 24th and again at his request to March 12th on the ground that Gidlof's witness, one Dr. Solar, was not available; that March 12th Gidlof again requested 30 days to procure the absent witness and the cause was continued until April 10th; that April 11th a motion for a continuance was again made by Gidlof; and that the motion was denied by Assignment Judge Fisher. The motion, supported by affidavit, under Rule 14 of the Supreme Court was presented to the trial judge on April 14th and again denied. Gidlof contends this was error. This affidavit makes no showing of due diligence on the part of Gidlof to obtain the evidence. There was no showing otherwise to the trial court. There was no error committed, therefore, in denying the motion.

Gidlof's attorney asked permission to question the prospective jurors with respect to their connection with or interest in the Indemnity Insurance Company of North America. In the affidavit in support of the petition Gidlof states that the insurer has large offices in Chicago and numerous employees who may be impaneled in the case as jurors and other persons financially interested who may be impaneled as jurors and that Gidlof may be thereby prejudiced. This affidavit was clearly insufficient to justify asking the question which Gidlof's attorney sought leave to ask. Wheeler v. Rudek, 397 Ill. 438. There is no merit in the

highest point of the investigation and on following morning was at
the interview. The change in Giddix's was mainly to the
fact that he is now a resident of the city of Chicago.
The record shows that at Giddix's request the case was
removed from the regular place in the trial calendar and set for
December 7, 1904. It was called December 7, 1904 and set for trial
for January 11, 1905. At Giddix's request the case was continued
until January 11th and again at his request to March 11th on the
ground that Giddix's attorney, one W. J. Giddix, was not available;
that March 11th being a day on which he was to travel and would
not be in the city. The court then set the case for April 11th; that date
being a holiday and the court was unable to sit; and then
the action was taken by assignment under Giddix. The action
continued by Giddix, under whom it is by the answer books and
returned to the trial date on April 11th and again delayed.
Giddix continued this case until the 11th of April when he moved
it and Giddix on the day of trial he was in the evidence.
There was no showing whatever by the trial court, under the
error committed, therefore, in finding the action.
Giddix's attorney asked permission to withdraw the
case. The court then refused to grant permission with the interest
in the January 11th case. In the
affidavit in support of the petition Giddix stated that the interest
was large because in Chicago and throughout the country who may be
interested in the case he knows and other persons immediately
interested who may be interested in the case and that Giddix may be
interested in the case. This affidavit was obviously intended to
justify the action which Giddix's attorney sought leave
to take. Marshall v. Marshall, 107 Ill. 425. There is no merit in the

contention that the Court erred in refusing the permission sought.

The trial began Monday, April 14th. Gidlof concluded his case in chief Friday morning April 18th. Grosser rested Monday afternoon April 21st. Gidlof's attorney requested that the trial resume the next day, April 22nd, so that a mechanic could be produced to testify in defense against the property damage claim of Grosser, based on a repair bill introduced in evidence. The court granted the request, although the defendant had rested early in the afternoon of April 21st. After the mechanic testified, shedding little light, Gidlof's attorney sought leave to call two further witnesses, made an offer of proof which indicated that these witnesses, if called, would testify that they were riding in a taxicab following Gidlof's car. The court denied leave to put the witnesses on, saying that the trial had been going on for seven days and should have been finished in three and one-half hours. Gidlof contends that the court erred in this ruling. The general rule is that where the point to which the witnesses would testify is relevant and controverted, the court should not limit the number of witnesses to be called. Green v. Insurance Co., 134 Ill. 310.

The trial began and proceeded as though Gidlof was plaintiff and Grosser defendant. Grosser's case was not separated into the defense against Gidlof and affirmative proof of his claim against Gidlof. The verdict and judgment, nevertheless, were in favor of Grosser as plaintiff and against Gidlof as defendant. The confusion resulted from the failure to realign the parties properly after the consolidation. To add to the confusion at the close of Gidlof's case in chief, both parties offered motions and instructions for the court to direct a not guilty verdict for defendant, without naming the defendant. Gidlof was satisfied

apparently to have the case proceed as it was. We think that the general rule referred to (Green v. Insurance Company) was not intended to prevent the trial court from exercising a wise discretion in bringing this case to a close. Two witnesses in addition to Gidlof had already given testimony substantially the same as that which the rejected witnesses would have given. We think the court acted wisely and did not commit error.

During the cross-examination of Gidlof, questions and answers in a police report were used as material of impeachment. Gidlof complains that the use of this police record and its subsequent admission into evidence violated Section 44, Article IV of the Motor Vehicle Act, Par. 141, Chap. 95½. That section prohibits using required reports to the Secretary of State as evidence in any trial, civil or criminal. Section 46 authorizes any city, etc. to provide by ordinance for similar required reports for city use. The disputed report does not fall within section 44. We do not consider Ritter v. Nieman, 329 Ill. App. 163, as authority for holding that it does. We are referred to no ordinance of the City of Chicago which would render the report inadmissible. No other complaint is made of the inadmissibility of the report. We see no merit in this complaint.

Gidlof testified that he followed a northbound street car on Halsted Street; that when it stopped on Wellington to take on three passengers he also stopped; and that when it started he started and was well into the intersection when struck by Grosser's automobile. He was referred to a pre-trial deposition and said he did not recall saying then that there was no traffic ahead of him going north. The court reporter who took the testimony at the pre-trial hearing, testified for Grosser that Gidlof did give the testimony referred to. There is no ambiguity in the term "traffic" as

used in the testimony. The court said, "Let the jury decide. He may answer." The court did not intend to have the jury determine the matter of law. The court by permitting the impeaching questions to be asked decided the question of law. Clearly, the court wished the jury to decide the truth of the disputed fact. We think the impeaching questions were contradictory of Gidlof's testimony at the trial. There was no error in the court's ruling.

We think it is fair to say that there is no contention made that the verdict is against the manifest weight of the evidence. There would be no merit to the point if made. There was evidence on behalf of Grosser which tended to prove that he was not negligent and that Gidlof was, in operating the respective cars. There is ample testimony that Grosser was in the exercise of due care and that Gidlof was negligent. It was a case for the jury.

Gidlof urges several errors in the giving and refusing of instructions. In his motion for a new trial Gidlof urged that the court committed error in refusing and giving instructions on behalf of the plaintiff and defendant. Clearly, he could not complain if instructions were given at his request and would not if any were refused which were offered by Grosser. Probably these points were urged to cover the lack of proper party alignment. The record contains the given instructions and recites they were given at the request of the "plaintiff and defendant." This could not have referred to Gidlof only because he complains of the giving of some. The record does not state what instructions were offered by Gidlof and what by Grosser.

Gidlof states in his brief that instructions appearing at certain pages in the record were given at Grosser's request and he directs his attack at them. He argues that, under Rule 7 of

[illegible]

this Court, we should accept as admitted the fact that the instructions referred to were offered by Grosser because the latter does not deny in his brief that he offered them. Rule 7 has no application to this situation. No authority or citation is offered by Gidlof as a basis for our considering his objections to the instructions. We consider it a dangerous practice to infer from a reading of an instruction, without more, that one party or the other offered it. Neufield v. Rodiminski, 41 Ill. App. 144. We shall not consider the points raised on the instructions. Price v. Bailey, 265 Ill. App. 358.

We have read the lengthy record and are unable to find any justification for the complaint that Gidlof was prejudiced at the trial by unnecessary and unfair remarks of the trial court.

We think substantial justice has been attained and the judgment is, therefore, affirmed.

AFFIRMED.

BURKE, P.J. AND LEWE, J. CONCUR.

This Court, we should expect to be asked the question
whether it was offered as evidence because the latter was not
given in his trial that he offered that. This I am not prepared
to say. No authority or citation is offered by the
as a basis for the objection to the introduction,
as a matter of a dangerous matter to the trial of a
introduction, without which, that and party on the other side is
entitled to a hearing. In 111, 104, 104, we shall not consider
the matter raised in the introduction. In 111, 104, 104, 104,
104, 104.

We have read the transcript and we find in this
any objection for the purpose that the trial was conducted in
the trial by the jury and the jury found in the trial.
as a matter of fact, the jury has been asked and the
jury is, therefore, entitled.

ATTORNEY

ROBERT, J. and L. J. GORDON

44375

HINSDALE MANUFACTURING COMPANY, a
corporation,

Appellee,

v.

MARTIN ROOT, NATHAN ROOT and HERMAN
ROOT, doing business as Root Brothers
Supply Company,

Appellants.

APPEAL FROM

CIRCUIT COURT

COOK COUNTY.

335 I.A. 124²

MR. JUSTICE KILEY DELIVERED THE OPINION OF THE COURT.

This is an appeal from an order denying a motion under Section 72 of the Civil Practice Act to vacate an ex parte judgment after 30 days. The trial court denied defendants' motion, and they have appealed.

October 13, 1944, plaintiff sued defendants for damages arising out of an alleged breach of contract. Attorney Lefkovits appeared for defendant October 18th and filed their answer on November 4th. February 6, 1945, plaintiff's attorney mailed notice to Lefkovits that on February 8th leave would be sought to file a reply. A reply was filed. On April 24, 1947 the cause was assigned to Judge Jones and on that day an ex parte judgment for \$4,429.59 was entered in favor of plaintiff and against defendants. Execution issued July 1st, was served July 30th and returned September 7, no part satisfied.

August 22, Attorney Suekoff, for defendant, filed a motion to vacate the judgment of April 24th. In support of the motion there was filed an affidavit of Attorney Lefkovits. Plaintiff moved to strike the defendants' motion and supporting affidavit. The motion was denied and plaintiff answered. The trial court heard the testimony of Defendant Herman Root and Attorney Lefkovits upon the issues made by the defendants' motion and plaintiff's answer thereto. The report of the proceedings including the testimony is before us. The testimony is that Attorney Lefkovits

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was the house attorney for defendants; that about January 31, 1945, he left defendants' employ without notifying them of his withdrawal from or abandonment of their defense to plaintiff's action; that defendants "thought plaintiff had dropped the suit"; and that on July 30th defendants had first knowledge of the judgment when the execution was served. Lefkovits testified that after receiving the notice from plaintiff's attorney in February 1945, he told the latter over the telephone that he no longer represented the defendants in the case and that all future motions should be served on defendants personally.

The motion to vacate stated that defendants were unable through excusable mistake and without negligence, to present a valid defense to plaintiff's action. The trial court's view was that defendants were negligent in not obtaining an attorney to succeed Attorney Lefkovits after he left their employ. We think the trial court's view was correct. The defendants were imprudent in assuming that plaintiff had dropped the suit. Hahn v. Gates, 169 Ill. 299.

Defendants had the burden of proving by a preponderance of evidence the facts stated in the motion to vacate. People v. Green, 355 Ill. 468. It was essential to the proof that it show that defendants were without negligence in failing to make their defense at the time of the judgment. We think it is plain that the defendants failed to make the required proof.

We need consider no further points nor comment on the cases cited.

For the reasons given the order of the Circuit Court is hereby affirmed.

ORDER AFFIRMED.

LEWE, P.J. AND BURKE, J. CONCUR.

see the house attorney for defendants; that about January 21, 1945, he left defendants' house without notifying them of his withdrawal from or abandonment of their defense so plaintiff's action; that defendant "thought plaintiff had dropped the suit"; and that on July 30th defendants and their knowledge of the judgment when the execution was served. Defendant testified that after receiving the notice from plaintiff's attorney in January 1946, he told the latter over the telephone that he no longer represented the defendants in the case and that all future motions should be served on defendants personally.

The motion to vacate stated that defendants were unable through exercise of due diligence and without negligence, to present a valid defense to plaintiff's action. The trial court's view was that defendants were negligent in not obtaining an attorney to cross-examine Attorney Petrovitch after he left their employ. We think the trial court's view was correct. The defendants were negligent in assuming that plaintiff had dropped the suit. Hahn v. Gates, 109 Ill. 399.

Defendants had the burden of proving by a preponderance of evidence the facts stated in the motion to vacate. People v. Green, 306 Ill. 488. It was essential to the proof that it show that defendants were without negligence in failing to make their defense at the time of the judgment. We think it is plain that the defendants failed to make the required proof. We need consider no further points nor comment on the

cases cited.

For the reasons given the order of the Circuit Court

is hereby affirmed.

ORDER AFFIRMED.

LEWIS, J. and BURMAN, J. CONCUR.

44396

NICK CAPTAIN, Administrator of
the Estate of Peter Captain,
Deceased,

Plaintiff - Appellant,

v.

PATSY (PASQUALE) SAVIANO and
ANGELO SAVIANO,

Defendants - Appellees.

APPEAL FROM

SUPERIOR COURT

COOK COUNTY.

335 I.A. 125

MR. JUSTICE KILEY DELIVERED THE OPINION OF THE COURT.

This is a wrongful death action. Chap. 70, Ill. Rev. Stats. Count 1 of the complaint alleges negligence and count 2 alleges wilful and wanton conduct. The trial court struck count 2 at the close of the evidence. The jury returned a not guilty verdict on count 1. Judgment was entered on the verdict and plaintiff has appealed.

March 21, 1946, Peter Captain, nine years old, was crossing Polk Street from south to north between Marshfield Avenue and Paulina street in Chicago. He was struck by an automobile being driven west on Polk Street by defendant Pasquale Saviano. Peter Captain suffered injuries from which he died the following day.

Issues made upon count 1 were whether plaintiff was in the exercise of due care consistent with his age; whether the car was being driven negligently; and whether Pasquale Saviano was the agent of his father Angelo Saviano who owned the automobile.

There were three witnesses for plaintiff at the trial. Two police officers who observed the scene of the accident within a half hour of its occurrence, and Cecelia Philbrick who said she saw the accident. Plaintiff refused to waive the bar to the testimony of Pasquale Saviano, under Sec. 2 of the Evidence Act, and there was, accordingly, no testimony offered by defendant.

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THE UNIVERSITY OF CHICAGO

* *On the Ground and Under the Sea*

March 11, 1942, New Orleans, Louisiana

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Directorate of the Ministry of the Interior, 1940-1941

10-10-1964

PROPERTY OF THE U.S. AIR FORCE

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ALL INFORMATION CONTAINED HEREIN IS UNCLASSIFIED

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and have not associated in civilian life in any way.

The police officers testified that the front grill of the automobile was crushed; that the automobile was found to be in good operating condition; that a tire or skid mark started about the center of Polk Street, swerved south to within 4 or 5 feet of the south curb and then continued west about 20 to 25 feet; that a trickle of blood extended from the turn of the tire mark near the curb to a large pool of blood 20 to 25 feet west; and that they made a thorough but unsuccessful search for material witnesses. Cecelia Philbrick said she was walking east on the south side of Polk Street and saw the automobile with headlights burning going west on Polk Street about 50 or 60 miles an hour on the wrong side of Polk Street; that she also saw Peter Captain leave a group of boys playing in a vacant lot south of the sidewalk and walk toward the curb; that the automobile did not change direction and struck the boy when he had gone 3 or 4 feet into the street; and that she did not notice whether the boy looked either way before stepping from the curb.

At the close of the evidence the court directed a verdict in favor of Angelo Saviano; struck count 2; and submitted count 1 to the jury. We see no merit to the contention that the court should not have submitted count 1 to the jury and that it should have directed a verdict thereon for the plaintiff. Plaintiff argues that there was no question of fact as to the negligence of defendant Pasquale Saviano. There was the additional question of due care on the part of Peter Captain. We think the court properly submitted the case on count 1 to the jury. The fact that there was no defense testimony does not militate against this conclusion. This conclusion is consistent with the cases cited by plaintiff, (Vail v. Graham, 259 Ill. App. 172; Harrison v. Bingham, 350 Ill. 269; and Bunch v. Padva, 333 Ill. App. 24.).

very little knowledge from the past.

[illegible]

In view of this conclusion we see no necessity of passing on the question of the propriety of directing a verdict for Angelo Saviano on count 1.

We think the court committed error in taking count 2 from the jury. There is evidence that Pasquale Saviano drove the automobile from 50 to 60 miles an hour at night with the headlights burning; that he was driving on the wrong side of Polk Street; and without changing the direction of the automobile drove it into Peter Captain who was 3 or 4 feet from the curb. There is no question under this count of the boy's due care. The contradictions in the testimony of the police officers and Cecelia Philbrick, her creditability and the improbability of her story and whether she was under a mistaken impression are all matters for the jury in the first instance. We cannot say her testimony is of such a nature that it should not receive the consideration of the jury.

For the reasons given the judgment is reversed and the cause is remanded for further proceedings on count 2 consistent with this opinion.

REVERSED AND REMANDED.

BURKE, P.J. AND LEWE, J. CONCUR.

In view of this consideration we are not generally
inclined to the question of the propriety of
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case is decided by the fact of the fact of the fact of the fact
with this opinion.

WILLIAM J. BROWN, J. J. BROWN, A. BROWN.

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WILLIAM KRUG, WAYNE KRUG,
JACOB CRUSIUS, MIKE SEL-
GAR, EDWARD WUEBBENS and
LOUIS F. KEARFOTT,

Appellees,

v.

ARMOUR AND COMPANY, a cor-
poration, and KARL MAPLE,

Appellants.

APPEAL FROM SUPERIOR
COURT, COOK COUNTY.

335 I.A. 222

MR. PRESIDING JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

On the evening of September 14, 1942 an automobile containing Edward Wuebbens, Mike Selgar and Louis F. Kearfott, crashed into the rear of an Armour and Company truck which had become stalled, because of mechanical difficulties, on state route 116 about three miles west of Pontiac, Illinois. Immediately following this accident another car containing Wayne Krug, William Krug and Jacob Crusius, crashed into the rear of Wuebbens' car. The six plaintiffs brought suit to recover damages for personal injuries sustained by each of them as a consequence of these two accidents. Trial by jury resulted in the following verdicts: Edward Wuebbens was awarded \$500; Louis F. Kearfott, \$1500; Mike Selgar, \$200; William Krug, \$15,000; his son, Wayne Krug, \$7500; and Jacob Crusius, \$10,000. After motions of the defendants for judgments notwithstanding the verdicts and for a new trial had been overruled, the court entered judgments on the verdicts, from which defendants appeal.

It appears from the evidence that on the day of the accident Karl Maple, an Armour and Company employee, was ordered to take a load of meat from Chicago to Peoria. He set out with an International tractor and trailer weighing approximately 17 tons, passed through Pontiac between 9:00

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WILLIAM KRAIG, ALVIN KRAIG,
JACOB GRUBBS, LEO KRAIG,
LOUIS KRAIG, and
LOUIS KRAIG, JR.

Defendants,

VERSUS
ARMOUR AND COMPANY, INC.,
Plaintiff.

ARMOUR AND COMPANY, INC.,
Plaintiff,

Defendants.

On the evening of September 14, 1942 an automobile

driven by Edward Wehrens, alias Wehler and Louis F. Kramert,
crashed into the rear of an Armour and Company truck which
had become stalled, because of mechanical difficulties, on
state route 110 about three miles west of Pontiac, Illinois.
Immediately following this accident another car containing
Wayne Kraig, Alvin Kraig and Jacob Grubbs, crashed into
the rear of Wehrens' car. The six plaintiffs brought suit
to recover damages for personal injuries sustained by each
of them as a consequence of these two accidents. Trial by
jury resulted in the following verdicts: Edward Wehrens
was awarded \$500; Louis F. Kramert, \$150; Alvin Kraig,
\$150; William Kraig, \$15,000; Alvin Kraig, \$15,000; Jacob
Grubbs, \$10,000. After motion of the defendants
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On the evening

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Defendants.

ARMOUR AND

VERSUS

Plaintiff,

Defendants,

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ALVIN KRAIG,

JACOB GRUBBS,

LEO KRAIG,

LOUIS KRAIG,

and

LOUIS KRAIG, JR.

and 9:30 P.M. and turned west on state highway 116. About three miles beyond Pontiac his motor began to sputter, and his tractor, facing in a westerly direction, came to a halt on the highway. When Maple found that he could not get the motor started, he requested Devreis, the driver of an Armour truck which was traveling behind him, to go back to Pontiac for a mechanic. Devreis returned with one Holdridge, who operated a garage, and a boy named Durham, who worked in a filling station. They found that the fuel pump on the motor was not functioning. While they were working under the hood of the tractor, a 1929 Chevrolet, driven by Wuebbens, ran into the rear end of the trailer, extinguishing the lights on the car and causing only minor damage. It was raining quite hard at the time. Wuebbens stepped out of the car to talk to Maple, who had walked to the rear of the trailer after the impact. Kearfott and Selgar remained in the car. Shortly thereafter a 1941 Nash, driven by Wayne Krug, with his father William Krug and Jacob Crusius as the other occupants, crashed into the rear of the Chevrolet, causing it to collapse "like an accordion," as Wayne Krug testified, and catapulting William Krug and Crusius through the windshield "with their chests resting upon the hood."

With respect to both accidents it is urged by defendants as the principal grounds for reversal (1) that all the plaintiffs were guilty of contributory negligence as a matter of law, and (2) that the judgments in their favor are against the manifest weight of the evidence.

As to the second contention, there is a sharp conflict in the evidence whether the rear lights on the trailer were burning at the time of either the first or second collision and also whether defendants complied with the statute requir-

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filling station. They found that the fuel pump on the motor
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ran into the rear end of the trailer, extinguishing the
lights on the car and causing only minor damage. It was
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car to talk to people, who had walked to the rear of the
trailer after the impact. Leestoft and Gelfert remained in
the car. Shortly thereafter a 1941 Nash, driven by Wayne
King, with his father William King and Jacob Grimes as the
other occupants, crashed into the rear of the Chevrolet,
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and also whether defendants complied with the statute requir-

ing the driver of a truck stalled on the highway between sunset and sunrise to place and maintain flares, lanterns or other signals as a warning to approaching vehicles from both directions (Motor Vehicles Act, Ill. Rev. Stat. 1947, ch. 95-1/2, par. 218 (b)). Maple testified that immediately after his truck became stalled he set out fusees, then lighted his pot flares and placed them on the highway, one approximately 100 feet behind the truck, one to the rear of the trailer, and another 100 feet in front of the truck on the opposite side of the highway; that there were four red and four amber lights and one tail light on the rear of the truck, all of which were lighted. He stated that several cars and trucks passed in both directions while he was directing traffic. It is not contended that Wuebbens drove the Chevrolet at an excessive rate of speed. He and the other occupants of the car testified that they were driving at about twenty to twenty-five miles an hour, and Wuebbens stated that although he had no windshield wiper he had clear vision for about seventy-five feet. Maple testified, and it was defendants' contention upon trial, that the left front wheel of the Chevrolet had run over the pot flare to the rear of the trailer, breaking it and extinguishing the light. Among the several plaintiffs, Wuebbens was the only one who admitted seeing any pot flare on the road. He said that after the accident he saw an object lying on the highway which he thought might be his hat. On attempting to retrieve it he discovered that it was an iron object, wet and cold and not lighted. Holdridge, who returned from Pontiac with Devreis to inspect the Armour truck, testified that there were several lights on the back of the truck and flares burning both to the front and rear of the trailer when he arrived, and that after

ing the driver of a truck stalled on the highway between
against and otherwise to place and maintain lights, lanterns
or other signals as a warning to approaching vehicles from
both directions (Motor Vehicle Act, R.S.C. 1947, Chap.
98-1, par. 219 (5)). While testifying that immediately
after his truck became stalled he got out of it, then
lighted his two flares and placed them on the highway, one
approximately 100 feet behind the truck, one to the rear of
the trailer, and another 100 feet in front of the truck on
the opposite side of the highway; that there were four red
and four amber lights and one tail light on the rear of the
truck, all of which were lighted. He stated that several
cars and trucks passed in both directions while he was
directing traffic. It is not contended that Thompson drove
the Chevrolet at an excessive rate of speed. He and the
other occupants of the car testified that they were driving
at about twenty to twenty-five miles an hour, and Thompson
stated that although he had no headlights when he had clear
vision for about seventy-five feet. While testifying, and in
view of Thompson's contention upon trial, that the left front
wheel of the Chevrolet had run over the pot hole to the
rear of the trailer, breaking it and extinguishing the light.
Among the several witnesses, Thompson was the only one who
admitted seeing any pot hole on the road. He said that after
the accident he was an eye of lying on the highway which he
thought might be the pot hole. On attempting to retrieve it he
discovered that it was an iron object, wet and cold and not
lighted. Thompson, who returned from Ontario with several
to inspect the iron truck, testified that there were several
lights on the back of the truck and flares warning both to the
front and rear of the trailer when he arrived, and that after

the accident when he started out to call an ambulance, the flare to the rear of the truck was still burning. Robert Durham, who accompanied Holdridge from Pontiac, testified that before the accident there were flares about 115 feet ahead of the truck, and that the red warning lights and amber caution lights on the rear of the truck were burning. Edward Goetzler, testifying on behalf of defendants, stated that he arrived at the scene of the accident after an ambulance had taken the injured plaintiffs to a hospital in Pontiac; that when he arrived there were flares both to the rear and front of the truck. As against this evidence all the plaintiffs testified that there were no lights of any kind on the back of the Armour trailer, and that if there were any pot flares set out at the required distance behind the truck and adjacent thereto, they were not burning at the time of and immediately prior to the accidents.

Defendants' counsel say it is extremely unlikely that Maple would have extinguished all the lights on the rear of the truck when he became stalled on the highway and have failed to set out flares as required by the statute. However, our courts have consistently held that where a fair question of fact is raised by the evidence, the reviewing court will not set aside the jury's finding as being against the manifest weight of the evidence. Goldstein v. Metropolitan Life Ins. Co., 324 Ill. App. 168; Carney v. Sheedy, 295 Ill. 78; Ulbricht v. Western Coach Lines, 289 Ill. App. 164; and Summers v. Hendricks, 300 Ill. App. 498. In Silberman v. Washington Nat. Ins. Co., 329 Ill. App. 448, the court said that "The jury in this case had the right to believe plaintiff's evidence and to disregard that offered by defendant. A court of review should not set aside a verdict where the evidence conflicts even though the apparent weight of

the accident when he started out to call an ambulance, the
flame to the rear of the truck was still burning. Robert
Gorman, who accompanied Goldrick from Pontiac, testified
that before the accident there were flames about 15 feet
ahead of the truck, and that the red warning lights and
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295 Ill. 78; Whitely v. Western Coach Lines, 289 Ill. App.
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the evidence impresses the court as being in favor of the unsuccessful party (Carney v. Sheedy, 295 Ill. 78)." In Mirich v. Forscher Contracting Co., 312 Ill. 343, the court said that "One of the recognized benefits of trial by jury is that the jury sees and hears the witnesses, which gives them superior advantage over a reviewing court in determining the credibility of the witnesses and the weight and credit that should be given their testimony," and in Nadenik v. Nadenik, 372 Ill. 408, it was held that "Where there is a conflict in the evidence it is the function of the jury to pass upon the evidence, determine whether the witnesses were interested or disinterested, and the amount of weight which should be given to their testimony." In the case at bar the jury heard the conflicting lines of evidence to be weighed, and if they believed the Armour truck was without lights, it was a sufficient foundation for a finding that defendants were guilty of negligence, and under the established rule in this state we would not be justified in holding that the verdicts were contrary to the manifest weight of the evidence. Mapes v. Hulcher, 363 Ill. 227.

The argument that plaintiffs were contributorily negligent as a matter of law and that the court should therefore have allowed defendants' motions for judgments notwithstanding the verdicts, is divided into two parts. Wuebbens testified that he could see 75 to 100 feet ahead without any windshield wiper; and that he was traveling about 20 miles an hour, at which rate of speed he could stop his car within 75 feet. In consequence of this testimony, defendants contend that he must have seen the Armour truck in sufficient time to have brought his car to a stop before the impact, and their counsel say that his failure to do so indicates such negligence as a matter of

law as to preclude recovery. The absence of a windshield wiper on the Chevrolet is urged as an additional indication that plaintiffs were contributorily negligent. The law is well settled that if a person without fault on his part is confronted with sudden danger, the obligation resting upon him to exercise ordinary care for his own safety does not require him to act with the same deliberation and foresight which might be required under ordinary circumstances. Synwolt v. Klank, 296 Ill. App. 79. Wuebbens testified that the Armour truck suddenly loomed before them. He was thus confronted with a sudden danger, and even though he might have been able to bring his car to a stop within 75 feet under ordinary circumstances, it was properly a question of fact for the jury to decide whether his failure to do so in the situation then confronting him, amounted to contributory negligence.

Defendants cite several cases (Cooney v. F. Landon Cartage Co., 308 Ill. App. 444, James v. Motor Transit Management Co., 260 Ill. App. 246, Johnson v. Kushler, 269 Ill. App. 553, and McDermott v. McKeown Transportation Co., 263 Ill. App. 325) in support of their contention that the court should have entered judgments notwithstanding the verdicts. Johnson v. Kushler is the only one of these decisions where the reviewing court concluded that plaintiff was guilty of negligence as a matter of law. There plaintiff's car collided with the rear end of defendant's trailer. After reviewing the testimony of numerous witnesses the court held that each of the plaintiffs was guilty of contributory negligence in not keeping such a look-out ahead as would have enabled them to discover defendant's trailer in time to stop their car before the impact.

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Management Co., 280 Ill. App. 246; Johnson v. Chrysler, 209
 Ill. App. 252, and Wentworth v. Western Transportation Co.,
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In McKay v. Hannah (Abst.), 320 Ill. App. 437, plaintiffs were injured when their automobile collided with the rear end of a truck which had been parked on a four-lane highway on a dark night after the motor failed. There the evidence was also conflicting as to the sufficiency of the lighting on the truck and as to a flare placed at the rear of the trailer. After reviewing the evidence we held that the trial court did not err in denying defendant's motion for judgment notwithstanding the verdict for plaintiffs and that the question of negligence was properly submitted to the jury.

As to the second accident, it is urged that since Wayne Krug was driving at an excessive rate of speed under the circumstances, as defendants contend, and with his dim lights burning in violation of the provisions of par. 200, ch. 95-1/2, Ill. Rev. Stat. 1947, he was contributorily negligent. Evidence adduced upon the trial showed that Krug's uncle cautioned him to watch the road and not to drive so fast. His uncle Crusius, who was sitting beside Wayne, testified that he knew Wayne was watching the road and attributed his admonition to a "back-seat driving intuition" due to the fact that he (Crusius) usually drove the car himself, and he stated that the farther they went the slower they went. Wayne Krug's testimony, which was corroborated by Crusius, indicates that he was driving between 30 and 35 miles an hour, watching the road. It was for the jury to determine whether under the circumstances that rate of speed was commensurate with his obligation to exercise due care for his own safety. As to the charge that the occupants of the second car violated the Uniform Act Regulating Traffic on Highways (Ill. Rev. Stat. 1947, ch.

In McLain v. Johnson (Ist.), 330 Ill. App. 438, 439, 1931-32.

It was held that the defendant was negligent in that he was driving at an excessive rate of speed under the circumstances, as defendant contended, and with his lights burning in violation of the provisions of par. 200, ch. 92-1/2, Ill. Rev. Stat. 1947, he was contributorily negligent. Evidence adduced upon the trial showed that Krug's uncle cautioned him to watch the road and not to drive so fast. His uncle testified that he knew Krug was watching the road and attributed his attention to a "back-seat driving inhibition" due to the fact that he (Krug's uncle) usually drove the car himself, and he stated that the father they went the slower they went. Krug's testimony, which was corroborated by Krug's uncle, indicates that he was driving between 30 and 35 miles an hour, watching the road. It was for the jury to determine whether under the circumstances that rate of speed was commensurate with his obligation to exercise due care for his own safety. As to the charge that the occupants of the second car violated the Uniform Act Regulating Traffic on Highways (Ill. Rev. Stat. 1947, ch.

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95-1/2, par. 200), which provides in part that after sunset every motor vehicle should carry two lighted lamps visible at least 500 feet in the direction toward which such motor vehicle is proceeding, plaintiffs' counsel argue that any defense relying upon the statutory provision must be pleaded (People v. City of Chicago, 377 Ill. 573, and Shapiro v. Kartsonis, 330 Ill. App. 299), and that a defendant cannot avail himself of any matter of defense which was not stated in his answer even though it appears in the evidence (Parker v. Dameika, 372 Ill. 235, and Seaborn v. Miller, 322 Ill. App. 399). Aside from that contention, Wise v. Kuehne Manufacturing Co., 322 Ill. App. 26 (leave to appeal denied, 326 Ill. App. xiv), and Carroll v. Krause, 295 Ill. App. 552 (leave to appeal denied 295 Ill. App. xxii), are authority for the rule that whether or not driving with dim lights is negligence under the facts in a particular case becomes a question for the jury.

As to the first accident, it is argued that since the Wuebbens' car had set out for the neighboring village of Graymont, where Kearfott wanted to inquire about some work or employment in which Wuebbens and Selgar were also interested, Wuebbens became the agent of Selgar and Kearfott and Wuebbens' negligence would therefore be imputed to them. As to the second accident, counsel argue that since Wayne Krug was a minor, 20 years of age, his negligence would be imputed to his uncle, Jacob Crusius, the owner of the car. As heretofore indicated, the negligence, if any, of both drivers was properly a question of fact for the jury, and since by their verdicts they found that neither Wuebbens nor Wayne Krug was guilty of contributory negligence, these contentions would be unavailing.

37-1/2, par. 20), which provides in part that after sunset every motor vehicle should carry two lighted lamps visible at least 500 feet in the direction toward which such motor vehicle is proceeding, plaintiff's counsel argues that any defense relying upon the statutory provision must be pleaded. (People v. City of Chicago, 277 Ill. 273, and People v. Kautzsch, 330 Ill. App. 329), and that a defendant cannot avail himself of any matter of defense which was not stated in his answer even though it appears in the evidence (People v. Kautzsch, 330 Ill. App. 329, and People v. Miller, 322 Ill. App. 330). Aside from that contention, People v. Kautzsch, 330 Ill. App. 329, is authority (leave to appeal denied 332 Ill. App. 330, and People v. Kautzsch, 330 Ill. App. 330, and People v. Kautzsch, 330 Ill. App. 330, are authority for the rule that whether or not driving with dim lights is negligence under the facts in a particular case becomes a question for the jury. As to the first accident, it is agreed that since the defendants' car had set out for the neighboring village of Graymont, where Kautzsch wanted to inquire about some work or employment in which Kautzsch and Kautzsch were also interested, Kautzsch became the agent of Kautzsch and Kautzsch and Kautzsch's negligence would therefore be imputed to them. As to the second accident, counsel argues that since Kautzsch was a minor, 20 years of age, his negligence would be imputed to his uncle, Jacob Kautzsch, the owner of the car. As heretofore indicated, the negligence, if any, of both drivers was properly a question of fact for the jury, and since by their verdicts they found that neither defendant nor Kautzsch was guilty of contributory negligence, these contentions would be unavailing.

As additional ground for reversal it is urged that the trial court committed reversible error in giving to the jury instructions numbered 2, 26 and 27 at plaintiffs' request. The first of these instructions deals with the question of ordinary care and the other two touch upon the measure of damages. Counsel say that instruction No. 2 is an omnibus-type of instruction in that it groups all the plaintiffs together; that since there were two separate accidents with different facts, plaintiffs do not all stand in the same relationship, and that it fails to distinguish and differentiate between the several plaintiffs. If this instruction is subject to the criticism made, defendants evidently fell into the same error because their instruction No. 20 given by the court likewise groups all the plaintiffs without differentiation, and the law is well settled that a party has no right to complain of error in an instruction when like error appears in one given at his own request. Fleming v. E., J. & E. Ry. Co., 275 Ill. 486; Lill v. Murphy Door Bed Co., 290 Ill. App. 328. With respect to instructions numbered 26 and 27 it is likewise urged that they were an omnibus-type instruction, grouping all the plaintiffs together in respect of the question of damages. Here again we find that the question of damages was fully covered by the giving of defendants' instructions numbered 23, 24 and 25, one of which refers to all the plaintiffs, and for the reasons hereinbefore indicated, defendants cannot complain of an error in which they themselves participated. Moreover, we think defendants are precluded from criticizing these instructions for additional reasons. Section 68 of the Civil Practice Act (Ill. Rev. Stat. 1947, ch. 110, par. 192) requires that a party moving for a new trial shall file the points in writing, "particularly specifying the grounds of such motion." Defendants specified some 38 general

As additional ground for reversal it is urged that the trial court committed reversible error in giving to the jury instructions numbered 2, 15 and 27 as plaintiffs' requests. The first of these instructions deals with the question of ordinary care and the other two touch upon the measure of damages. I can say that instruction No. 2 is an omnibus-type of instruction in that it groups all the plaintiffs together; that since there were two separate accidents with different facts, plaintiffs do not all stand in the same relationship, and that it fails to distinguish and differentiate between the several plaintiffs. If this instruction is applied to the criticism made, defendants evidently fell into the same error because their instruction No. 20 given by the court likewise groups all the plaintiffs without differentiation, and the law is well settled that a party has no right to complain of error in an instruction when like error appears in one given at his own request. Y. E. & E. Ry. Co., 275 Ill. 486; Ill. v. Murphy Tool Fed. Co., 290 Ill. App. 328. With respect to instructions numbered 15 and 27 it is likewise urged that they were an omnibus-type of instruction, grouping all the plaintiffs together in respect of the question of damages. Here again we find that the question of damages was fully covered by the giving of defendants' instructions numbered 23, 24 and 25, one of which refers to all the plaintiffs, and for the reasons hereinbefore indicated, defendants cannot complain of an error in which they themselves participated. Moreover, we think defendants are precluded from criticizing these instructions for additional reasons. Section 68 of the Civil Practice Act (Ill. Rev. Stat. 1947, ch. 110, par. 192) requires that a party moving for a new trial shall file the points in writing, "particularly specifying the grounds of such motion." Defendants specified some 38 general

grounds in support of their motion, but the only item which could refer to the instructions now sought to be criticized is No. 17, as follows: "The court erred in giving to the jury the instructions and each of them requested by the plaintiffs and read to the jury by the court and marked 'Given' by the court." None of these instructions is identified by number and no grounds are particularly specified as to why any of the instructions are erroneous. In none of the cases that have been called to our attention or which we have been able to find has the question arisen in precisely the form presented in this proceeding, but our courts of review have at various times dealt with the subject matter involved. The application of the rule arose in a different form in Lasher v. Colton, 225 Ill. 234, where appellant complained of the giving of instruction No. X. In his motion for a new trial he had set out the special grounds upon which he relied. In an additional opinion on petition for rehearing the court held that he was confined to the grounds specified and set forth in that motion, citing various cases, and in the course of the opinion said: "An examination of the abstract in this case shows that in the points set up on this written motion for a new trial nothing is stated that specifically or in a general way covers any objection to said instruction X. * * * The written motion for new trial having attempted to specify the grounds of such motion, and failing, as shown by the abstract, to raise any question as to instruction X being faulty, appellant can not urge the question before this court." See also Odin Coal Co. v. Tadlock, 216 Ill. 624, to the same effect. In McClintock v. Lake Forest University, 222 Ill. App. 468, appellant contended that the court erred in giving instructions numbered 1 and 2 requested by appellee. It appeared that

grounds in support of their motion, but the only item which could refer to the instructions now sought to be criticized is No. 17, as follows: "The court erred in giving to the jury the instructions and each of them repeated by the plaintiffs and read to the jury by the court and marked 'given' by the court." None of these instructions is identified by number and no grounds are particularly specified as to why any of the instructions are erroneous. In none of the cases that have been called to our attention or which we have been able to find has the question arisen in precisely the form presented in this proceeding, but our courts of review have at various times dealt with the subject matter involved. The application of the rule arose in a different form in Lasher v. Colton, 227 Ill. 234, where appellant complained of the giving of instruction No. X. In his motion for a new trial he had set out the special grounds upon which he relied. In an additional opinion on petition for rehearing the court held that he was confined to the grounds specified and set forth in that motion, citing various cases, and in the course of the opinion said: "An examination of the transcript in this case shows that in the points set up on this written motion for a new trial nothing is stated that specifically or in a general way covers any objection to said instruction X. * * * The written motion for new trial having attempted to specify the grounds of such motion, and failing, as shown by the transcript, to raise any question as to instruction X being faulty, appellant can not urge the question before this court." See also Edin Coal Co. v. Talbot, 210 Ill. 624, to the same effect, in Edin Coal Co. v. Talbot, 222 Ill. 468, 469. Appellant contended that the court erred in giving instructions numbered 1 and 2 requested by appellee. It appeared that

appellant had made a motion for a new trial and specified the points upon which it relied, including certain instructions given for appellee, but instructions numbered 1 and 2 were not specified. It was there held that under section 81 of the Practice Act which was then in force appellant could have questioned those instructions without a motion for a new trial or under such a motion without specifying any points, "but when it filed special points under said motion it waived all other points, and therefore it waived any error in giving said instructions Nos. 1 and 2. Yarber v. Chicago & A. R. Co., 235 Ill. 589, on page 602. Having waived these errors, if they existed, appellant could not regain the right to question them by the general assignment of errors attached to the record in this case." In the Yarber case, which is frequently cited, the court held that under the existing practice decisions of the court made in the progress of a trial upon instructions, objections to evidence, or other matters of law arising in the cause which had been incorporated in a bill of exceptions, might be assigned for error and reviewed by an appellate court without any motion for a new trial. "They are not waived by making a motion for a new trial if such motion is submitted without any points stated in writing. But if a motion is made for a new trial and the grounds thereof are stated in writing, the party is limited to those reasons and all other errors are deemed to have been waived." In Erikson v. Ward, 266 Ill. 259, defendant filed a written motion for a new trial assigning 22 reasons therefor, but in none of them was it stated that a new trial should be granted for the reason that it was not proved that plaintiff had a license, and the court held that "where a party files a written motion for a new trial he will be held

appellant had made a motion for a new trial and specified the points upon which it relied, including certain instructions given the jury, but instructions numbered 1 and 2 were not specified. It was then held that under section 31 of the Practice Act which was then in force appellant could have questioned those instructions without a motion for a new trial or under such a motion without specifying any points, "but when it filed special points under said motion it waived all other points, and therefore it waived any error in giving said instructions Nos. 1 and 2. Wright v. Chicago & A. R. Co., 197 Ill. 389, on page 399. Having waived these errors, it they existed, appellant could not regain the right to question them by the formal assignment of errors attached to the record in this case." In the Wright case, which is frequently cited, the court held that under the existing practice decisions of the court made in the progress of a trial upon instructions, objections to evidence or other matters of law arising in the course which had been incorporated in a bill of exceptions, might be assigned for error and reviewed by an appellate court without any motion for a new trial. "They are not waived by making a motion for a new trial if such motion is submitted without any points stated in writing. But if a motion is made for a new trial and the grounds thereof are stated in writing, the party is limited to those reasons and all other errors are deemed to have been waived." In Wright v. Chicago & A. R. Co., 197 Ill. 389, 399. appellant filed a written motion for a new trial assigning 22 reasons therefor, but in none of them was it stated that a new trial should be granted for the reason that it was not proved that plaintiff had a license, and the court held that "where a party files a written motion for a new trial he will be held

to have waived all causes therefor not set forth in his written motion," citing Ottawa, Oswego and Fox River Valley Railroad Co. v. McMath, 91 Ill. 104, Hintz v. Graupner, 138 Ill. 158, West Chicago Street Railroad Co. v. Krueger, 168 Ill. 586, and Illinois Central Railroad Co. v. Johnson, 191 Ill. 594. In People v. Vickers, 326 Ill. 290, a written motion for a new trial was made and five reasons were assigned why the motion should be granted, but none of the special assignments were based on the denial of the motion to continue, and in holding that that question was not before it for review the court said that "where a party files a written motion for a new trial he will be held to waive all causes therefor not set forth in his motion. (Erikson v. Ward, 266 Ill. 259.) The trial court should have an opportunity to correct its own errors if any have been committed." In Minnis v. Friend, 360 Ill. 328, defendant complained that his instructions numbered 25, 26, 27 and 31 were refused, and his counsel argued "that the trial court erred in refusing many other instructions not mentioned in the motion for a new trial." The court held that "such other instructions need not be considered," citing People v. Vickers, 326 Ill. 290, and Erikson v. Ward, 266 Ill. 259. We had occasion to consider the necessity of complying with the requirements of the statute in specifying the reasons for a new trial in Rubottom v. Crane Co., 302 Ill. App. 58, and there pointed out that "the very purpose of the motion for a new trial is to give the trial court an opportunity to correct its errors, and if such opportunity is not given by calling the court's attention to the errors charged, the reviewing court would find itself at a loss to assign a valid reason for reversal." Since defendants in the case at bar did not particularly specify any of plaintiffs' instructions by number or specify any grounds which would inform the trial court of their

to have waived all causes therefor not set forth in his written motion," citing Ottawa, Gassens and Fox River Valley Railroad Co. v. McWaters, 91 Ill. 104, Wicks v. Gannaway, 138 Ill. 158, East Chicago Street Railroad Co. v. Bragg, 168 Ill. 586, and Illinois Central Railroad Co. v. Johnson, 191 Ill. 594. In People v. Vickers, 356 Ill. 290, a written motion for a new trial was made and five reasons were assigned why the motion should be granted, but none of the special assignments were based on the denial of the motion to continue, and in holding that that question was not before it for review the court said that "where a party files a written motion for a new trial he will be held to waive all causes therefor not set forth in his motion." (Wicks v. Ward, 356 Ill. 259.) The trial court should have an opportunity to correct its own errors if any have been committed. In Wicks v. Ward, 356 Ill. 328, defendant complained that his instructions numbered 25, 26, 27 and 31 were refused, and his counsel argued "that the trial court erred in refusing many other instructions not mentioned in the motion for a new trial." The court held that "such other instructions need not be considered," citing People v. Vickers, 356 Ill. 290, and Wicks v. Ward, 356 Ill. 259. We had occasion to consider the necessity of complying with the requirements of the statute in specifying the reasons for a new trial in Thompson v. Crane Co., 352 Ill. 495, 58, and there pointed out that "the very purpose of the motion for a new trial is to give the trial court an opportunity to correct its errors, and if such opportunity is not given by calling the court's attention to the errors charged, the review the court would find itself at a loss to assign a valid reason for reversal." Since defendants in the case at bar did not particularly specify any of plaintiff's instructions by number or specify any grounds which would inform the trial court of their

contention that it had erred in the giving of any particular instructions, we think defendants should be held to the rule and precluded from raising any question as to instructions not particularly specified in their motion for a new trial.]

Lastly it is urged that the damages awarded plaintiffs Wayne Krug, William Krug and Jacob Crusius were excessive. It should be noted that defendants introduced no evidence on the question of damages. However, we have examined the record as to the testimony on behalf of these plaintiffs and have reached the conclusion that it amply supports the verdicts rendered by the jury. The question of damages is particularly one of fact for the jury. No contention is made in this case that the size of the verdicts resulted from prejudice or passion, and the amounts awarded seem to be in keeping with the nature and extent of the injuries.

This case was fairly tried, and after a careful examination of the record we find no meritorious ground for reversing the judgments, which are accordingly affirmed.

JUDGMENTS AFFIRMED.

Scanlan and Sullivan, JJ., concur.

contention that it had entered in the giving of any particular instructions, we think defendants should be left to the jury and precluded from raising any question as to instructions not particularly specified in their motion for a new trial.

Lastly it is urged that the damage caused plaintiff's injury was not proved. It should be noted that defendants introduced no evidence on the question of damages. However, we have examined the record as to the testimony on behalf of these plaintiffs and have reached the conclusion that it amply supports the verdict rendered by the jury. The question of damages is particularly one of fact for the jury. No contention is made in this case that the size of the verdict resulted from prejudice or passion, and the amount awarded seems to be in keeping with the nature and extent of the injuries.

This case was fairly tried, and after a careful examination of the record we find no meritorious ground for reversing the judgment, which are accordingly affirmed.

JUDGMENT AFFIRMED.

Condon and Sullivan, JJ., concur.

No. 10216

In the

Abstract

APPELLATE COURT OF ILLINOIS

Second District

October Term, A. D. 1947

SANTE PETERSON, as Administrator of the Estate of Maria Peterson, de- ceased,	)	Appeal from
	)	Circuit Court,
Plaintiff-Appellant,	)	Lake County.
vs.)	
ALF HENDRICKSON and WILMA	)	Honorable
HENDRICKSON,	)	Ralph J. Dady,
Defendants, Appellees.)	)	Judge Presiding.

BRISTOW, J.

335 I.A. 223¹

Suit was instituted in the Circuit Court of Lake County to recover damages sustained by the next of kin of Maria Peterson, deceased, who was killed as a result of an accident in falling down the stairway in defendants' tavern.

Trial upon a complaint and answer resulted in a verdict for appellant in the sum of \$2000.00. The lower court entered judgment for defendant notwithstanding the verdict, and the appeal questions the propriety of that action.

We will refer to appellant as plaintiff and appellees as defendants. The complaint charged the defendant with

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ALBANY, N.Y.

TO THE HONORABLE SENATE OF THE STATE OF NEW YORK
IN SENATE CHAMBERS
JANUARY 10, 1899
REPORT OF THE
COMMISSIONERS OF THE LAND OFFICE
IN RESPONSE TO A RESOLUTION PASSED BY THE SENATE
JANUARY 1, 1898

THE LAND OFFICE ALBANY, N.Y. JANUARY 10, 1899	THE SENATE ALBANY, N.Y. JANUARY 10, 1899
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THE LAND OFFICE
ALBANY, N.Y.
JANUARY 10, 1899

TO THE HONORABLE SENATE OF THE STATE OF NEW YORK
IN SENATE CHAMBERS
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REPORT OF THE
COMMISSIONERS OF THE LAND OFFICE
IN RESPONSE TO A RESOLUTION PASSED BY THE SENATE
JANUARY 1, 1898

operating a tavern for the purpose of selling beverages to the public. ~~The stairway to the basement lays along the north wall of the building and leads down going west out of the bar room.~~ At the head of the stairway is an entrance room about 40 inches square which contained two doors, one affording an entrance from the main bar room over which was a sign marked "TELEPHONE", and the other directly opposite affording an entrance onto the basement stairs. On the center of the south wall was a public toll telephone. This second door led into a stairway which the defendants and their employees used to go to and fro to the basement where various beverages supplies were stored. It was charged in the complaint, Maria Peterson being impliedly invited to use the telephone room, that it was the duty of the defendants to keep it in a reasonably safe condition; that as a result of the carelessness of the defendants in the maintenance of said room, plaintiff decedent was caused to fall down the stairway to the basement resulting in injuries which caused her death; and that she was in the exercise of due care for her own safety at and before the time of the occurrence in question.

Count One specifically charged that defendants' negligence consisted of a failure to keep the door and entrance into the basement stairway in a reasonably safe condition and negligently permitting the door to the basement to remain improperly latched, which fact the defendants knew or should have known.

Count Two charged the defendant with permitting the telephone room and stairway to remain so insufficiently lighted that persons using these inadequately lighted

operating a tavern for the purpose of selling beverages
to the public. The defendant is charged with
the violation of the following provisions of the
law: At the time of the offense, the defendant
entrance room about 10 inches square and contained two
doors, one affording an entrance from the main bar room
over which was a sign marked "ENTRANCE", and the other
directly opposite affording an entrance into the basement
stairs. In the center of the north wall was a public
cell telephone. This second door led into a room
which the defendant and their employees used to go to and
fro to the basement where various beverages were stored.
It was charged in the complaint, which telephone
being implicitly invited to use the telephone room, that
it was the duty of the defendant to keep it in a reason-
ably safe condition; that as a result of the defendant's
of the defendant in the maintenance of said room, defendant
defendant was caused to fall from the stairs to the base-
ment resulting in injuries which caused her death; and that
she was in the exercise of due care for her own safety at
and before the time of the occurrence in question.
Count One specifically charged that defendant's
negligence consisted of a failure to keep the door and
entrance into the basement stairway in a reasonably safe
condition and negligently permitting the door to the base-
ment to remain improperly latched, which fact the defendant
knew or should have known.
Count Two charged the defendant with permitting the
telephone room and stairway to remain in an unsafe
condition and persons using same negligently injured

premises would be apt to fall down the stairway. The Third Count charged that the defendants negligently failed to keep the stairway guarded. The defendants' answer denied almost everything contained in the complaint.

There is very little conflict in the evidence, which was as follows. At a late hour on February 9, 1946, Maria Peterson and her husband, the administrator herein, came to defendants' tavern as patrons. Mr. Peterson was playing euchre with some people, and Mrs. Peterson had a couple of glasses of beer. About 12:30 A. M. on February 10th, she went to the telephone room to call a taxi to go home.

The door leading into the telephone room is on the east side of it, is 26 inches wide, and hinges on the right side as one enters. Directly opposite the door is the one leading into the basement, 35 inches wide. The hinges are on the right side thereof and it opens onto the basement steps which are twelve in number. A light bracket with a bulb was located on the east wall of the telephone room, located between the door jamb and the south wall. This light was turned off and on by tightening or loosening the bulb. The basement light was operated by a switch which was located on the south wall of the basement stairway, just inside the entrance. The door that led from the telephone room to the basement was of flat board construction with a latch handle instead of a knob and equipped with a hook and eye for fastening purposes. Both the hook and eye were in good condition of repair.

The telephone room floor was covered with linoleum in good condition and there were no objects or debris on the floor which was clean and dry. On the east wall in

2. The first of these is the fact that the system is not in a steady state. The system is in a steady state only if the rate of change of the system is zero. In this case, the rate of change of the system is not zero, and the system is not in a steady state.

1952-1953

plain view are the entrances to two rest rooms. So that to go to the ladies' rest room you would walk east, while to the telephone room you would walk west. The decedent was a woman about 54 years of age, five feet five inches in height, weighing about 175 pounds. There was testimony that her husband told at the inquest that she had had a weak heart, but on this trial he denied making the statement and the fact she had a weak heart.

Eric Lund was a witness called on behalf of plaintiff. He said Mrs. Peterson said she was going to call a taxi; that she took a nickel out of her purse and went into the telephone booth; and that only a few minutes prior thereto a bar-tender came up from the basement carrying a case of beer. The bar-tender said that he had been to the basement that evening for a case of beer, but that he was sure that it was not later than 9:30 P. M. when he went to the basement and that he had locked the door leading to the basement when he returned. Mr. Lund further testified that he heard decedent talking over the telephone, but over the noises in the tavern and the juke box he could not distinguish her words. He further testified that it was only a minute after he had heard her talk when he learned she had fallen; that an oil cloth shopping bag containing groceries belonging to Mrs. Peterson was standing on the floor under the telephone; and that the room was lighted.

It appears from the evidence, without any dispute, that the public was not invited to use the stairway leading to the basement; that, generally, at night the telephone booth was lighted with a bulb of about 40 to 50 watts; that Mrs. Peterson had used this room on previous occasions;

that defendants' tavern is a place generally frequented by people living in the neighborhood; and that the Petersons on previous occasions had patronized the business..

The sole question presented on this review is whether the trial court was correct in holding that the plaintiff's case, viewed in the most favorable light, giving it the benefit of all legitimate inference that can be drawn from the facts adduced by it on the trial, was one ~~where~~^{that a} matter of law recovery cannot be sustained. Or in other words, does the record show that plaintiff has made out a prima facie case. We are not called upon to weigh the evidence nor to determine the preponderance of conflicting testimony.

Appellant has pointed out in his brief, language used by this court in Van Hoorebecke v. Iowa-Illinois Gas & Electric Co., 324 Ill. App. 88, which may well serve as a guide in considering the problem under consideration.

"A motion for a directed verdict, either at the close of all the testimony, or a motion for judgment notwithstanding the verdict, all raise the same question. Merlo v. Public Service Company of Northern Illinois, 381 Ill. 300, 311, 45 N. E. (2d) 665. Such motions are in the nature of a demurrer to the evidence, and present only a question of law as to whether, when all of the evidence is considered, together with all reasonable inferences drawn therefrom, in its aspect most favorable to the plaintiff, there is evidence tending to prove any cause of action stated in the complaint. If there is, the motion should be denied, and the weight and credit to be attached to it in connection with the other facts and circumstances shown are questions for the jury, even though, upon the entire record,

the evidence may preponderate against the plaintiff so that a verdict in favor of the plaintiff cannot stand when tested by a motion for a new trial. Todd v. S. S. Kresge Co., 384 Ill. 524, 527, 52 N. E. (2d) 206; Walaite v. Chicago, Rock Island and Pacific R. Co., 376 Ill. 59, 62, 33 N. E. (2d) 119; Bartolucci v. Falletti, 382 Ill. 168, 173, 46 N. E. (2d) 980. Under a motion for a directed verdict, the court does not weigh the evidence, and has no power to determine the weight and preponderance of conflicting testimony. Merlo v. Public Service Company of Northern Illinois, 381 Ill. 300, 45 N. E. (2d) 665; Minnis v. Friend, 360 Ill. 328, 336, 196 N. E. 191." (Italics ours.)' Also this court in Thomason v. Chicago Motor Coach Co., 292 Ill. App. 104, 10 N. E. (2d) 714 had the following to say: "A number of personal injury cases have recently come to this court, wherein juries had been directed to find for defendants where it appeared that plaintiffs had made out a prima facie case, and we, therefore, deem it advisable to restate long-settled principles of law that govern the action of a court in passing upon a motion to direct a verdict for the defendant in cases of this character.

"A motion to instruct the jury to find for the defendant is in the nature of a demurrer to the evidence, and the rule is that evidence so demurred to, in its aspect most favorable to the plaintiff, together with all reasonable inferences arising therefrom, must be taken most strongly in favor of the plaintiff. The evidence is not weighed, and all contradictory evidence or explanatory circumstances must be rejected. The question presented

on such motion is whether there is any evidence fairly, tending to prove the plaintiff's declaration. In reviewing the action of the court of which complaint is made, we do not weigh the evidence; we can look only at that which is favorable to appellant. Yess v. Yess, 255 Ill. 414, 99 N. E. 678; McCune v. Reynolds, 288 Ill. 188, 123 N. E. 317; Lloyd v. Rush, 273 Ill. 489, 113 N. E. 122. ' Hunter v. Troup, 315 Ill. 293, 296, 297, 146 N. E. 321." Mahan v. Richardson, 284 Ill. App. 493, 495, 1 N. E. (2d) 100, 101.

"The general rule is that negligence and contributory negligence are questions of fact for the jury, and so long as a question remains whether either party has performed his legal duty or has observed that degree of care and caution imposed upon him by law, and the determination of the question involves the weighing and consideration of evidence, the question must be submitted as one of fact. Chicago, St. Louis & Pittsburg Railroad Co. v. Hutchinson, 120 Ill. 587, 11 N. E. 855; Austin v. Public Service Co., 299 Ill. 112, 132 N. E. 458, (17 A. L. R. 795). Before we can say as a matter of law, that there was no negligence on the part of the defendant, or that there was such contributory negligence on the part of the plaintiff as to defeat recovery, we must be able to say that all reasonable minds must agree that the defendant was not negligent in his acts, or that the injury was the result of plaintiff's own negligence." Petro v. Hines, 299 Ill. 236, 240, 132 N. E. 462, 464, 18 A. L. R. 1106. See, also, Pollard v. Broadway Central Hotel Corporation, 353 Ill. 312, 322, 323, 187 N. E. 487."

We are furthermore mindful of the principles controlling in cases of this character that juries must not be called upon to guess, conjecture, and speculate as to what might have happened to cause injury, but a reasonable explanation of the happening must be found in the testimony. Language used in the case of Southern Railway Co. v. Dickinson, 100 So. 665, outlines very well the basic distinction or contrasting character of what may be conjecture or reasonable inference. "As a theory of causation, a conjecture is simply an explanation consistent with known facts or conditions, but not deducible from them as a reasonable inference. There may be two or more plausible explanations as to how an event happened or what produced it; yet if the evidence is without selective application to any one of them, they remain conjecture only. On the other hand, if there is evidence which points to any one theory of causation, indicating a logical sequence of cause and effect, then there is judicial basis for such determination, notwithstanding the existence of other plausible theories with or without support in the evidence."

Appellant in his brief argues very persuasively and soundly that the evidence in the record reasonably implies^{22P} the following inference: "Mrs. Peterson, while in the telephone room, inadvertently leaned against the door which opened onto the basement stairs. This door, being unhooked, swung open and caused her to fall into the basement. ----- Under the record in this appeal, it must be admitted that Inar Jarvis went to the basement for supplies a minute or two before Mrs. Peterson met her death and that in so doing,

he had to enter and leave the basement through the door which constituted the east wall of the telephone room. From the remaining facts it can be reasonably inferred that he neglected to fasten that door by use of the hook and eye device. It is undisputed that Maria Peterson went to the little telephone room only for one purpose--to call a cab so that she could go home. It is undisputed that almost immediately after she entered that room, the crash which indicated her fall was heard. It is undisputed that when the persons rushed into the telephone room to find her, the door to the basement was open. It is undisputed that the door to the basement could be secured only by use of the hook and eye arrangement and that the latch which appeared to be on it was purely a dummy. It is not contended that Maria Peterson was intoxicated or disorderly. It is conceded that the distance between the phone and the door leading to the basement was just 20 inches and a physical examination of that distance indicates that when one uses that phone he could lean against the door and still speak into the phone with no effort. It is agreed that Mrs. Peterson's shopping bag was on the floor in the telephone room directly below the phone. There is no dispute but that the ladies' rest room was in another portion of the tavern and that Maria Peterson knew its location.", and in support thereof has the following to say: "Under this view as to how the accident occurred, we respectfully submit the jury was entirely warranted in finding that the defendants were negligent and that the plaintiff and his intestate were free from contributory negligence. As we have previously pointed out, the basement door of this telephone room constituted practically the entire east wall thereof. When that door was unsecured, it could be opened by a slight pressure. This fact the defendants knew

or should have known. When the door was opened, there was a precipitous flight of stairs immediately at the point of opening; there were no hand rails or safeguards which one might grasp in order to save oneself. It is common knowledge that persons, while phoning or in a small room, may sometimes lean against or brush against one of the walls. When that wall is not secure, it, in fact, becomes a trap, for a person brushing against it may very easily lose his or her balance and fall. That knowledge, actual or constructive, on the part of the defendants, coupled with the fact that what amounted to a pit was just outside of the unsecured wall in the small room clearly created a question for the jury as to whether or not, under those circumstances, the failure to properly secure the basement door constituted negligence." In view of the foregoing analysis, considering the proof most favorable to plaintiff, we are unable to conclude that all reasonable minds would agree that the defendant was not negligent. Denny v. Goldblatt Bros. Inc., 298 Ill. App. 325 at 332.

There is in the record sound evidence that Mrs. Peterson was a woman of careful habits. We are of the opinion that in considering all the reasonable inferences that must be resolved in plaintiff's favor, it became a question of fact for the jury to say whether or not decedent was exercising due care and caution for her own safety at the time of her fatal accident.

The defendant made no motion for new trial, and having failed to do so, that right has been waived. "In Schwickrath v. Lowden, 317 Ill. App. 431, at 433 the court says: 'The instant record shows that the defendants filed no motion

or should have been. When the door was opened, there was
a great deal of light of which the light of the door
opening, there was no light in the room which was
at that time in order to save himself. It is not in evidence
that because, while standing in a small room, was some-
times in a position or place against one of the walls, and
that wall is not secure, for in fact, because of the fact
a person standing against it may very easily fall down or
her balance and fall. That included, actual or construc-
tive, on the part of the defendant, could also be that
that was intended to put him just outside of the door
around wall in the small room which was a position
for the fact as to whether or not, under those circumstances,
the failure to properly secure the defendant was contributory
negligence. In view of the foregoing analysis, considering
the whole case, the court is of the opinion that the defendant
is liable for the death of the plaintiff and the defendant
is not negligent. Town v. Plaintiff, 1901, 100

Ill. App. 335 at 336.
There is in the record some evidence that the defendant
was a woman of good character, and that she was of the opinion that
it was necessary for the defendant to interview him, and he
testified in plaintiff's favor, it being a question of fact
for the jury to say whether or not defendant was contributing
his care and attention for her own safety at the time of her
fatal accident.

The defendant made no motion for new trial, and having
failed to do so, that right has been waived. In plaintiff
vs. defendant, 317 Ill. App. 451, at 453 the court says:
"The instant question is whether the defendant filed no motion

for a new trial. It is therefore the duty of this court, if it disagrees with the order of the trial judge entering judgment for the defendants notwithstanding the verdict, to reverse this order and to enter judgments here against the defendants upon the verdicts, and it is so ordered."

This cause is therefore reversed and judgment is entered here for plaintiff and against defendants in the sum of \$2000.00 and costs.

Judgment on Verdict Entered Here.

There are many things to be done in the way of
improving the water supply of the city. It is
important that the water supply be improved and
that the water be clean and pure. The water
supply of the city is at present very poor and
it is necessary to improve it. The water supply
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Continued on next page

Abstract

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Gen. No. 10169

Agenda No. 2

IN THE
APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

OCTOBER TERM, A. D. 1947

~~1856~~
593

ISABELLE C. GARDNER,
Plaintiff-Appellee

vs

HATTIE WAGNER CROSBY, doing
business as WAGNER and BRAUN
Defendant-Appellant

APPEAL FROM THE CIRCUIT
COURT OF WILL COUNTY

Dove, J.

335 I.A. 223²

The plaintiff, Isabelle C. Gardner, was employed by the defendant, Hattie Wagner Crosby in October 1944, upon a commission basis, as a saleslady in defendant's real estate office. The defendant had been in the real estate business in Joliet for many years and did business under the name of Wagner and Braun. On June 9, 1945 the relationship of the parties hereto as employer and employee terminated and thereafter on November 25, 1945 the plaintiff filed her complaint and thereafter her amended complaint seeking to recover of the defendant the sum of \$958.75. The defendant answered the amended complaint and filed a counterclaim and after the issues had been made up the cause was heard by the court without a jury, resulting in a judgment in favor

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

OCTOBER TERM, A. D. 1945

ISABELLE C. GARDNER,
Plaintiff-Appellee

vs

HATTIE WAGNER GROSSY, doing
business as WAGNER and BRAUN
Defendant-Appellant

APPEAL FROM THE CIRCUIT
COURT OF ILL. COUNTY

Nov. 1, 1945

The plaintiff, Isabelle C. Gardner, was employed
by the defendant, Hattie Wagner Grossy in October 1944, upon
a commission basis, as a saleslady in defendant's real estate
office. The defendant had been in the real estate business
in Illinois for many years and did business under the name
of Wagner and Braun. On June 9, 1945 the relationship of
the parties hereto as employer and employee terminated and
thereafter on November 25, 1945 the plaintiff filed her
complaint and thereafter her amended complaint seeking to
recover of the defendant the sum of \$253.75. The defendant
answered the amended complaint and filed a counterclaim and
after the issues had been made up the cause was heard by
the court without a jury, resulting in a judgment in favor

of the plaintiff and against the defendant for \$336.00 and the defendant appeals.

The amended complaint consisted of seven counts and each of the first six counts involved a separate real estate transaction. The seventh count is designated by counsel for plaintiff as "a further cause of action in tort". It realleged many of the averments of the previous counts and then charged that the defendant, after making the promises to pay the commissions so alleged, had no intention of fulfilling those promises but made those promises with intent to deceive and defraud the plaintiff; that plaintiff believed said statements to be true and relied upon them; that the conduct on the part of the defendant was part of a general scheme to defraud the public, that in furtherance thereof she took the title to the Harris and Furlong properties which she had listed for sale, in the name of Ford C. June, trustee, at a time when the plaintiff had made known to the defendant that she had written offers for the purchase of each of these properties for \$8500.00 but she completed the sales with each of the owners for \$7500.00. This count likewise demanded judgment for \$958.75.

Upon the hearing defendant testified that there remained due the plaintiff upon the transaction set forth in count I of the complaint the sum of \$9.75 and that was the amount of the judgment of the trial court upon this count. Upon the hearing the defendant also expressed her willingness to pay the plaintiff \$41.25, finders' fees, as she expressed it, upon the amount sought to be received by the plaintiff under the sixth count of the complaint and that was the amount of the judgment of the trial court upon that count. The trial court found the issues on count II for the plaintiff and rendered judgment in her favor on that count

of the plaintiff and against the defendant for \$100.00 and

the defendant's costs.

The plaintiff's complaint consisted of seven counts and

each of the first six counts involved a separate cause of action

against the defendant. The seventh count is a demand for

plaintiff's costs and is included in the sixth count.

Each of the first six counts is a demand for damages and

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each of the first six counts is a demand for damages and

for \$137.50. On counts III and IV the court found the issues for the defendant. On count V the court found the issues for the plaintiff and rendered judgment in her favor for \$212.50.

The judgment of the trial court is made up of the amount found due the plaintiff under count I, \$9.75; on count II, \$137.50; on Count V, \$212.50; on count VI, \$41.25. These several ^{amounts} ~~counts~~ aggregate \$401.00. Deducting from this amount \$65.00 which the court found due the defendant upon her counterclaim, leaves \$336.00 due the plaintiff and it was for this sum that judgment was rendered in favor of the plaintiff. As appellant does not argue or question the correctness of the judgment of the trial court on counts I and VI and as appellee has assigned, upon the judgment rendered on counts III and IV, no cross-errors, only counts II, V and VII need be considered.

The only controversy so far as count II of the complaint is concerned is whether the plaintiff is entitled to recover from the defendant 40% of the 5% commission or \$110.00 or 50% of the 5% commission amounting to \$137.50. The property involved is located on Peale Street in Joliet. It is conceded that the plaintiff found the buyer therefor and that the sale was consummated. Appellant insists that the contract provided that if she assisted appellee in closing the deal that then appellee was only entitled to receive 40% of the 5% commission instead of 50% thereof. We have read the testimony of the parties. Appellant testified that if appellee had handled the deal up to closing

for \$137.50. On counts III and IV the court found the
issues for the defendant. On count V the court found the
issues for the plaintiff and rendered judgment in favor
therefor for \$112.50.

The judgment of the trial court is made up of
the amount found for the plaintiff under count I, \$2.50;
on count II, \$137.50; on count V, \$112.50; on count VI,
amount \$411.50. These several amounts aggregate \$663.50. Deducting
from this amount \$551.00 which the court found due the
defendant upon her counterclaim, leaves \$112.50 due the
plaintiff and it was in this sum that judgment was rendered
in favor of the plaintiff. As appellant does not argue or
question the correctness of the judgment of the trial court
on counts I and VI and as appellee has assigned, upon the
judgment rendered on counts III and IV, no cross-motions,
only counts II, V and VII need be considered.

The only controversy as to count II of the
complaint is concerned in whether the plaintiff is entitled
to recover from the defendant 50% of the 5% commission on
\$112.50 or 50% of the 5% commission amounting to \$137.50.
The property involved is located on lands owned in fee.
It is conceded that the plaintiff found the buyer therefor
and that the sale was consummated. Appellant insists that
the contract provided that if the plaintiff applied in
closing the deal then appellee was only entitled to
receive 50% of the 5% commission instead of 50% thereof.
We have read the testimony of the parties. Appellant
testified that if appellee had handled the deal up to closing

she would be entitled to receive 50% of the commission but that appellee accompanied her, appellant, when they both went up to Walton's to conclude the deal and therefore she should receive \$110.00 instead of \$135.00. Appellee testified she never heard of any such arrangement. The trial court accepted the appellee's version of the terms of the contract and from all the evidence we are unable to say that the court was not justified in so doing.

Count V involved the property referred to in the record as the Furlong property located on Second Avenue. The evidence of the plaintiff is to the effect that she learned that this property was for sale through a newspaper advertisement and that the daughter of the owner told the plaintiff to go ahead and sell the property. The plaintiff testified that her prospective purchaser was Sam Tucci and that his first offer was \$7000.00 which was afterwards increased to \$7200.00 and on April 18, 1945 increased to \$7600.00. That on April 19, 1945 she reported the \$7600.00 offer to the defendant who thereupon informed her that the property had already been sold. According to the testimony of the defendant the plaintiff reported to her several offers to purchase this property, that she submitted to the owner the offer of \$6500.00 and the offer for \$7000.00 but both were declined. Her testimony is that on the morning of April 20, 1945 she sold the property to Ford C. June for \$7500.00 and in the afternoon of the same day so notified appellee. That appellee stated that Mr. Tucci would be terribly disappointed and that later the same day appellee submitted an offer from Tucci for \$8050.00 which June accepted. Subsequently, however, Tucci refused to accept the title, his down payment was returned to him and the sale to him was never consummated but a short time later June sold the property for \$9000.00. According to appellant \$7000.00 was the highest offer submitted by appellee

the Court in the matter of the defendant's appeal
appealed against the judgment, when they were to be
valued to a certain the said and in the said
\$100.00 instead of \$100.00. The Court in the matter of
of the said judgment. The Court in the matter of
version of the Court in the matter of the said
we are unable to say that the Court was not justified in so doing.
Count V states that the property was sold to the defendant
as the said judgment was made in the said matter, the defendant of
the plaintiff is to the effect that the said property was sold to the
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allegations made in the matter of the said judgment. The Court in the
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offer to the defendant and the Court in the matter of the said
they had already been sold. According to the defendant of the
defendant the plaintiff requested to pay several offers to purchase
this property, that she submitted to the Court in the matter of \$100.00
and the offer for \$100.00 but such were declined. The defendant
is that on the morning of April 10, 1900 she sold the property to
for \$100.00 and in the afternoon of the same day
as notified applicant. That applicant stated that Mr. Tamm would
be notified of the same and that after the same day applicant was
advised on April 10, 1900 for \$100.00 each from applicant. The
apparently, however, Tamm refused to accept the same. His offer
payment was returned to him and the sale to him was never consummated
but a check for \$100.00 was the property for \$100.00. According
to applicant \$100.00 was the highest offer submitted by applicant

prior to the time appellant sold the property to June for \$7500.00. Appellee insists that she produced Sam Tucci as a purchaser who offered \$7600.00 for the property and that this offer was submitted to appellant on April 19, 1945 which was the day before appellant sold the property to June for \$7500.00. After appellant had told appellee on April 20th that the property had been sold to June, appellee reported that fact to Tucci who raised his offer to \$8050.00.

On June 2, 1945 the sale of the Furlong property was completed and a conveyance executed by the owners to Ford C. June, who took the title as trustee. The trial court found that while this sale was being negotiated and at a time when appellee had a purchaser able to buy, appellant and Mr. June decided they would buy the property and did so, that thereafter appellant collected a broker's commission from the owner of the property and that her action was against the interest of the owner of the property and a breach of confidence upon the part of appellant toward appellee. The evidence of appellee was corroborated in some particulars by Sam Tucci, also by Louis Cordano, who was financing the deal for Tucci, by Margaret Bevan, the daughter of the owner of the property, by checks and other written documents. We are not inclined to disturb the finding or judgment of the trial court upon this transaction.

By her counterclaim appellant averred that she loaned appellee \$65.00 on April 4, 1945 which has never been repaid and further alleged that appellant on May 9, 1945, paid appellee \$212.50 anticipating that appellee would be entitled to that amount as commission upon the sale of the Harris property. The counter-claim averred that the sale of the Harris property was not consummated

... to the fact that the defendant sold the property to the plaintiff for \$1500.00. The plaintiff claims that the defendant sold the property to the plaintiff for \$1500.00. The defendant claims that the plaintiff sold the property to the defendant for \$1500.00. The court finds in favor of the plaintiff.

On June 2, 1944, the defendant sold the property to the plaintiff for \$1500.00. The plaintiff claims that the defendant sold the property to the plaintiff for \$1500.00. The defendant claims that the plaintiff sold the property to the defendant for \$1500.00. The court finds in favor of the plaintiff.

The court finds that the defendant sold the property to the plaintiff for \$1500.00. The plaintiff claims that the defendant sold the property to the plaintiff for \$1500.00. The defendant claims that the plaintiff sold the property to the defendant for \$1500.00. The court finds in favor of the plaintiff.

and therefore appellant was entitled to recover from appellee the amount mistakenly paid her. The trial court found for appellee upon the \$212.50 item and for appellant upon the \$65.00 item and credited the aggregate amount found due appellee on counts I, II, V and VI with said amount of \$65.00.

The owners of the Harris property listed with appellee the sale thereof for \$9500.00 on April 15, 1945. Appellee communicated this fact to appellant and on April 30th appellee found a purchaser, Louis Aageson, who offered \$8500.00 therefor. This offer was transmitted to the owners and they agreed to accept said sum. After the written offer was received and accepted by the owners, appellant sold the property to Ford June on May 9, 1945 for \$7500.00 and again Mr. June took title as trustee. The record is that Mr. June at that time was in Ft. Lauderdale, Florida and it does not appear that he ever saw the property. The trial court found that the result of the manner in which this transaction was handled was to enrich appellant and Mr. June and defraud the owners of the property. The trial court found that appellee had completed her obligations and duties in connection with this transaction and had obtained a purchaser who was ready, willing and able to purchase the property for \$8500.00, which amount the owners were willing to accept. Evidently appellant felt the same way because on May 9th she actually paid appellee the commission to which she was entitled. In disposing of the case the trial court stated that the Harris and Furlong transactions involved the same state of facts. Each sale was about to be consummated when Mr. June stepped in and bought the property, that Mr. June

[illegible]

and appellant occupied a fiduciary relationship towards each other, toward the owners and sellers and toward appellee and that their relationship was such that the transactions could not have been handled as they were without a full disclosure of all the facts to all the parties interested.

Counsel for both appellee and appellant call our attention to 9 Corpus Juris, par. 82B, p. 583 where it is stated: "A real estate broker and his sub-agent stand in practically the same relative position inter se with reference to the right to compensation as do the principal and the broker." Counsel for appellant cite Watts v. Howard & Calkins, 51 Ill. App. 243 which holds that a broker earns a commission if his act, however slight, brings about a sale but if his act fails to accomplish anything he is not entitled to compensation. There is no question about this being the law. From an examination of the record in this case, however, there is no question in our mind that the Furlong and Harris properties would have been sold to the purchasers produced by appellee had not /appellant and the party who took title as trustee prevented the sale being consummated. Appellee's commissions were earned and the conclusions arrived at by the trial court and the judgment rendered is supported by the law and the weight of the evidence. ^{The} Judgment of the Circuit Court of Will County will therefore be affirmed.

Judgment affirmed.

44383

ROSALIE BLOOM,)
Appellant,)
v.)
IRVING H. BABBITT,)
Appellee.)

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

335 I.A. 224

MR. PRESIDING JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

Plaintiff brought an action of forcible detainer in the Municipal Court to recover possession of the second-floor apartment in a two-story apartment building located at 3100 West Palmer Square in Chicago, occupied by defendant. Trial by jury resulted in a verdict and judgment for defendant, from which plaintiff appeals.

Suit was brought under section 209 (a) (2) of the Housing and Rent Act of 1947 (U.S. Code Congressional Service, 80th Congress, 1st Session, p. 207), the pertinent portion of which is as follows:

"Section 209 (a) No action or proceeding to recover possession of any controlled housing accommodations with respect to which a maximum rent is in effect under this title shall be maintainable by any landlord against any tenant in any court, notwithstanding the fact that the tenant has no lease or that his lease has expired, so long as the tenant continues to pay the rent to which the landlord is entitled unless--

"* * *

(2) the landlord seeks in good faith to recover possession of such housing accommodations for his immediate and personal use and occupancy as housing accommodations;" It is conceded that prior to the filing of suit plaintiff filed notice to terminate defendant's tenancy.

On trial plaintiff introduced a deed to the premises from

On trial plaintiff introduced a deed to the premises from

to terminate defendant's tenancy.

ceded that prior to the filing of said plaintiff filed notice

sonal use and occupancy as housing accommodations; It is per-
-sion of such housing accommodations for his immediate and per-

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continues to pay the rent to which the landlord is entitled
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any court, notwithstanding the fact that the tenant has no
shall be reimbursable by any landlord against any tenant in
respect to which a maximum rent is in effect under this title
possession of any controlled housing accommodations with
"Section 223 (a) in action or proceeding to recover
which is as follows:

Both Congress, 1st session, p. 107), the pertinent portion of
housing and rent act of 1947 (H.R. Code Congressional Services,
suit was brought under section 209 (a) (2) of the

which plaintiff seeks.

jury resulted in a verdict and judgment for defendant, from
which were in Chicago, occupied by defendant, tried by

ment in a two-story apartment building located at 2100 West

landlord Court to recover possession of the second-floor apart-

plaintiff brought an action of forcible detainer in the

the plaintiff sought recovery of the premises.

Appellee.

Plaintiff.

v.

Appellant.

NO. 11111

44303

the grantors, Solomon Schneider and Clara Schneider, her father and mother, which was made a part of the record by stipulation of the parties, showing that she had become the owner of the property prior to the commencement of suit, and the ownership of the premises was never questioned, as indicated by the remark of the trial judge in the course of the proceeding: "It may be admitted that she is the legal holder of the property." It further appears from the evidence that plaintiff had been married for two years and had resided in the building with her parents during that entire period and prior to her marriage, with the exception of eight months when she lived with her husband in Portage, Wisconsin. She testified that the building was given to her as a gift by her father and that she was the owner thereof when notice of termination was served. Her mother, Clara Schneider, corroborated her testimony by stating that she and her husband had made a gift of the property to their daughter of their own free will and accord. There was no countervailing proof. Upon this state of the record the sole question submitted to the jury under the court's instruction was whether plaintiff was in the exercise of good faith in bringing the action, and the jury were charged that if they were satisfied that the suit had been brought in good faith by the owner of record who wanted possession of the property for her own actual use, they should find for the plaintiff. Nevertheless, the jury returned a verdict in favor of defendant, and plaintiff contends that the verdict resulted from improper and prejudicial remarks made by defendant in the presence of two jurors who had been accepted and were subsequently impaneled to try the case and one of whom was selected to act as foreman of the jury. We do not consider it necessary to pass upon this contention, because in the view we take the cause will in all

the grantors, Solomon Schneider and Clara Schneider, her father and mother, which was made a part of the record by stipulation of the parties, showing that she had become the owner of the property prior to the commencement of suit, and the ownership of the premises was never questioned, as indicated by the remarks of the trial judge in the course of the proceedings: "It may be admitted that she is the legal holder of the property." It further appears from the evidence that plaintiff had been married for two years and had resided in the building with her parents during that entire period and prior to her marriage, with the exception of eight months when she lived with her husband in Portage, Wisconsin. She testified that the building was given to her as a gift by her father and that she was the owner thereof when notice of termination was served. Her mother, Clara Schneider, corroborated her testimony by stating that she and her husband had made a gift of the property to their daughter of their own free will and accord. There was no countervailing proof. Upon this state of the record the sole question submitted to the jury under the court's instruction was whether plaintiff was in the exercise of good faith in bringing the action, and the jury were charged that if they were satisfied that the suit had been brought in good faith by the owner of record who wanted possession of the property for her own actual use, they should find for the plaintiff. Nevertheless, the jury returned a verdict in favor of defendant, and plaintiff contends that the verdict resulted from improper and prejudicial remarks made by defendant in the presence of two jurors who had been accepted and were subsequently impeached to try the case and one of whom was selected to act as foreman of the jury. We do not consider it necessary to pass upon this contention, because in the view we take the case will in all

likelihood have to be retried for other reasons. The paramount question is whether there was any evidence to sustain the verdict. As heretofore pointed out, it stands admitted of record that plaintiff had the legal title to the premises, and the evidence adduced by her and her mother as to her good faith in seeking to recover possession under the Housing and Rent Act is uncontroverted. Defendant introduced no evidence whatsoever challenging plaintiff's good faith, but merely argues in his brief that the "conveyance was made to circumvent the existing rent regulations, was a mere sham and given to place plaintiff in a position where she could attempt to evict defendant from the premises on the ground that she was the owner thereof." In the absence of any evidence to support this contention, plaintiff made a clear case under the statute and within recent decisions on the subject. In Nofree v. Leonard, 327 Ill. App. 143, decided in November 1945, we held that the term "good faith," as used in a similar provision of a prior act there under consideration, can "only be reasonably construed as meaning an honest desire by the owner of housing accommodations to recover possession thereof for immediate use and occupancy as a dwelling for himself and that said owner legitimately required said housing accommodations to live in," and held that "as thus construed plaintiff's evidence [under the circumstances of that case] certainly made out at least a prima facie case that she acted in good faith." In that case there was some countervailing proof, whereas in the suit at bar no evidence whatever was adduced to rebut either the question of ownership or the good faith of the plaintiff, as contemplated by the act. More recently, Mr. Justice Sullivan, again speaking for the court in Mikkelsen v. McDonald, 333 Ill. App. 518, quoted with approval the definition of good faith given in Nofree v. Leonard. However, in the

likelihood have to be retained for other reasons. The paramount question is whether there was any evidence to sustain the verdict. As heretofore pointed out, it stands afloat of record that plaintiff had the legal title to the premises, and the evidence adduced by her and her mother as to her good faith in seeking to recover possession under the "good faith" rule was not as uncontroverted. Defendant introduced no evidence whatsoever challenging plaintiff's good faith, but merely argues in his brief that the "conveyance was made to circumvent the existing rent regulations, was a mere sham and given to place plaintiff in a position where she could attempt to evict defendant from the premises on the ground that she was the owner thereof." In the absence of any evidence to support this contention, plaintiff made a clear case under the statute and within recent decisions on the subject. In Holmes v. Leach, 327 Ill. App. 143, decided in November 1947, we held that the term "good faith," as used in a similar provision of a prior act there under consideration, can "only be reasonably construed as meaning an honest desire by the owner of housing accommodations to recover possession thereof for immediate use and occupancy as a dwelling for himself and that said owner legitimately received said housing accommodations to live in," and held that "as thus construed plaintiff's evidence [under the circumstances of that case] certainly made out at least a prima facie case that she acted in good faith." In that case there was some countervailing proof, whereas in the case at bar no evidence whatever was adduced to rebut either the question of ownership or the good faith of the plaintiff, as contemplated by the act. More recently, Mr. Justice Sullivan, again speaking for the court in Holmes v. Leach, 327 Ill. App. 143, quoted with approval the definition of good faith given in Holmes v. Leach. However, in the

later case defendant was not permitted to testify in her defense on the matter of plaintiff's good faith, although her counsel insisted on her right to do so, and the trial judge erroneously holding that plaintiff was not required to prove her good faith in seeking the possession of the premises for her own use, refused to allow defendant to introduce any evidence. For that reason the judgment was reversed and the cause remanded for a new trial.

There is nothing in the record which could be construed to show that plaintiff intended to use the premises for any one else's occupancy other than that of herself and her husband. Her testimony and that of her mother showed that her action to obtain possession of the apartment as living quarters for herself and her husband was brought in good faith. The notice served was admitted to have been timely and proper, and plaintiff conformed in all respects with the law. Under the circumstances we hold that there was no evidence to support the verdict. If plaintiff had made a motion for judgment notwithstanding the verdict, we would feel justified in reversing the judgment and remanding the case with directions that the motion be allowed and judgment entered in her favor, but no such motion was made, and accordingly it will be necessary to retry the case. The judgment of the Municipal Court is therefore reversed and the cause remanded for another trial.

JUDGMENT REVERSED AND CAUSE REMANDED
FOR A NEW TRIAL.

Scanlan and Sullivan, JJ., concur.

later case defendant was not permitted to testify in her case on the matter of plaintiff's good faith, although defendant insisted on her right to do so, and the trial judge erroneously holding that plaintiff was not required to prove her good faith in seeking the possession of the premises for her own use, refused to allow defendant to introduce any evidence. For that reason the judgment was reversed and the cause remanded for a new trial.

There is nothing in the record which could be considered to show that plaintiff intended to use the premises for any one else's occupancy other than that of herself and her husband. Her testimony and that of her mother showed that her action to obtain possession of the apartment as living quarters for herself and her husband was brought in good faith. The record shows that she was diligent to have been timely and proper, and plaintiff contended in all respects with the law. Under the circumstances we hold that there was no evidence to support the verdict. If plaintiff had made a motion for judgment notwithstanding the verdict, we would feel justified in reversing the judgment and remanding the case with directions that the motion be allowed and judgment entered in her favor, but no such motion was made, and accordingly it will be necessary to retry the case. The judgment of the municipal court is therefore reversed and the cause remanded for another trial.

JUDGMENT REVERSED AND CAUSE REMANDED FOR A NEW TRIAL.

44110

McKAY ENG. INEERING AND CONSTRUCTION
CO., a Cor. poration,
Appellant,

v.

THE SANITARY DISTRICT OF CHICAGO,
a Municipal Corporation,
Appellee.

202
APPEAL FROM SUPERIOR
COURT OF COOK COUNTY.

335 I.A. 224²

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

An action at law, in part for fraud and deceit and in part in assumpsit, brought by McKay Engineering and Construction Company, a corporation, against The Sanitary District of Chicago, a municipal corporation. The cause was tried by the court and a jury and a verdict was returned finding the issues for plaintiff and assessing plaintiff's damages at \$242,091.76. Defendant did not file a motion for a new trial, but filed a motion for judgment notwithstanding the verdict of the jury, which motion was sustained and judgment entered thereon. By agreement the judgment allowed plaintiff the sum of \$2,556.90, which had been retained by The Sanitary District under the provisions of the contract. Plaintiff appeals from that part of the judgment order sustaining defendant's motion for judgment notwithstanding the verdict.

X
The complaint alleges that on February 20, 1936, a contract was entered into between plaintiff and defendant for the construction of a project known as West Towns Outlet Sewer Contract No. 2. The contract is annexed to the complaint. Briefly stated, the complaint further alleges that among the maps, plans and data on file at the office of the chief engineer of defendant, and which plaintiff, under the provisions of the contract, was required to examine, was a certain soil information blue print purporting to classify the subsurface soil to be encountered in constructing the structures to be built under

THE CITY OF CHICAGO
PLANNING AND CONSTRUCTION
DEPARTMENT
CHICAGO, ILL.

ALFRED H. BROWN
COUNT OF JOHN BROWN

THE CITY OF CHICAGO
PLANNING AND CONSTRUCTION
DEPARTMENT
CHICAGO, ILL.

MR. JUSTICE ROBERTS, CHIEF JUSTICE OF THE SUPREME COURT

In action at law, in part for taking and detaining

part in as respects, brought by Henry Engineering and Construction
Company, a corporation, against The Sanitary District of Chicago,
a municipal corporation. The case was tried by the court and
a jury and a verdict was returned finding the facts for plaintiff
and assessing damages at \$100,000.00. Plaintiff
and did not file a motion for a new trial, but filed a motion
for judgment notwithstanding the verdict of the jury, which
motion was sustained and judgment entered thereon. By agree-
ment the judgment allowed plaintiff the sum of \$2,500.00, which
has been received by The Sanitary District under the provisions
of the contract. Plaintiff appeals from that part of the judg-
ment and other sustaining defendant's motion for judgment notwith-
standing the verdict.

The complaint alleges that on February 20, 1936, a con-
tract was entered into between plaintiff and defendant for the
construction of a project known as West Towns Chief Sewer
Contract No. 1. The contract is annexed to the complaint.
Briefly stated, the complaint further alleges that among the
plans, plans and data on file at the office of the chief engineer
of defendant, and with plaintiff, under the provisions of the
contract, was required to examine, was a certain soil information
blue print purporting to classify the subsoil as to be
encountered in constructing the sewerage to be built under

the contract; that said blue print constituted a controlling factor in estimating the cost of performing the work under the contract and that plaintiff relied upon the soil information data so furnished by defendant; that the information on said soil information blue print was false and untrue and was known to be false and untrue by defendant; that defendant had in its possession the true and correct information of the subsurface soils, which it failed to disclose to plaintiff, and that in performing the work under the contract plaintiff was required to change its method of procedure and to install additional machinery and equipment, and to conduct a portion of the work under compressed air in counterdistinction to free air, which was the method of procedure originally approved by defendant; that by reason of the different subsurface conditions encountered during the progress of the work plaintiff was put to additional expense in completing the contract, in excess of \$300,000. Plaintiff filed a bill of particulars setting forth in detail wherein it claimed that the soil information blue print was inaccurate and false, and itemized the additional costs and expense incurred by plaintiff by reason of encountering the changed conditions. Plaintiff also filed an additional bill of particulars in which it stated the particular portions of the work which it was required to perform and did perform under compressed air, and attached to said bill of particulars 51 exhibits setting forth the normal and additional cost of the work performed by plaintiff under its contract with defendant by items and periods. The answer of defendant admitted that the contract was completed in accordance with the provisions thereof to the satisfaction of defendant's chief engineer. The answer denied generally all material allegations in the bill of particulars and the additional bill of particulars and set forth a number of provisions of /

the contract; that said blue print constituted a controlling factor in estimating the cost of performing the work under the contract and that plaintiff relied upon the said information as so furnished by defendant; that the information on said soil information blue print was false and untrue and was known to be false and untrue by defendant; that defendant had in its possession the true and correct information of the subgrade soils, which it failed to disclose to plaintiff, and that in performing the work under the contract plaintiff was required to change its method of procedure and to install additional machinery and equipment, and to construct a portion of the work under compressed air in counterbalancing to free air, which was the method of procedure originally approved by defendant; that by reason of the different subgrade conditions encountered during the progress of the work plaintiff was put to additional expense in completing the contract, in excess of \$200,000.00, which plaintiff filed a bill of particulars setting forth in detail what it claimed that the soil information blue print was inaccurate and false, and itemized the additional costs and expenses incurred by plaintiff by reason of encountering the changed conditions. Plaintiff also filed an additional bill of particulars in which it stated the particular portions of the work which it was required to perform and did perform under compressed air, and attached to said bill of particulars 21 exhibits setting forth the normal and additional cost of the work performed by plaintiff under its contract with defendant by items and periods. The answer of defendant admitted that the contract was completed in accordance with the provisions thereof to the satisfaction of defendant's chief engineer. The answer denied verbally all material allegations in the bill of particulars and the additional bill of particulars and set forth a

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contract which defendant alleged were a bar to plaintiff's cause of action. The answer also set forth as an additional defense the five-year Statute of Limitations. Plaintiff's reply to defendant's answer denies specifically the affirmative allegations of the answer excepting such matters as purported to be excerpts from the written contract, denies that the action is barred by the Statute of Limitations, and alleges that this is an action on a written contract and was commenced within ten years after the cause of action accrued, and in the alternative alleges that if the action is construed in whole or in part as being based upon an implied contract, then said cause of action accrued upon the discovery by plaintiff in December, 1943, of certain boring records and reports made and prepared by defendant's engineer, William J. Powers, prior to December, 1935, and which records and reports have ever since been in the custody and control of defendant and were by defendant concealed and withheld from plaintiff until plaintiff discovered the same in December, 1943. Defendant did not file any answer to plaintiff's reply.

Plaintiff states its theory as follows: "That the soil information blue print, which was furnished by defendant and which defendant required plaintiff to examine and heed and upon which data plaintiff relied, based its estimate of costs, submitted its bid, and was induced to enter into the contract, was a positive misrepresentation of a material fact whereby plaintiff was damaged; that defendant withheld and concealed from plaintiff soil data information which it had in its possession and which differed materially from the soil information it furnished plaintiff; that the defendant had knowledge of the falsity of the data shown on the soil information blue print at the time it placed on said blue print a statement to the effect that the information was believed to be accurate but was not guaranteed."

Defendant states its theory as follows: "That there was no positive representation of a material fact but on the contrary a mere statement of belief as to the accuracy of the so-called soil information blue print which was expressly stated not to be guaranteed; that that statement, such as it was, was not made with intent to induce or influence the plaintiff to act upon it, but on the contrary the statement and the provisions of the contract as a whole indicate that the statement was not made with such intent; that the statement of belief expressed on the soil information blue print was not known to the defendant to be false; that the statement of belief was not such that the plaintiff had a right in making its bid to rely upon it to the exclusion of all of the other provisions of the contract; the information shown on the soil information sheet was not false; in other words, that plaintiff failed to prove all the necessary elements of an action for fraud and deceit; and further that the plaintiff did not comply with the provisions of the contract which compliance were conditions precedent to the establishment of any claim against the defendant; plaintiff's alleged cause of action is barred by the statute of limitations, and all work performed by the plaintiff was required by the contract at the prices agreed upon and paid by defendant."

Plaintiff contends that "the trial court erred in entering judgment in favor of the defendant notwithstanding the verdict of the jury in favor of the plaintiff. The trial court had no authority to weigh and determine controverted questions of fact."

In Tidholm v. Tidholm, 391 Ill. 19, the court states (pp. 23, 24): "The verdict of a jury in a will contest has the same force and effect as the verdict of a jury in an action at law, (Hunt v. Vermilion County Children's Home, 381 Ill. 29; Voodry

Defendant states the theory as follows: "That there was no positive representation of a material fact but on the contrary a mere statement of belief as to the accuracy of the so-called soil information. This point which was expressly stated not to be material; that that statement, though it was, was not made with intent to induce or influence the plaintiff to act upon it, but on the contrary the statement and the provisions of the contract as a whole indicate that the statement was not made with such intent; that the statement of belief expressed on the soil information was not known to the defendant to be false; that the statement of belief was not such that the plaintiff had a right in making its bid to rely upon it to the exclusion of all of the other provisions of the contract; the information shown on the soil information sheet was not false; in other words, that plaintiff failed to prove all the necessary elements of an action for fraud and deceit; and further that the plaintiff did not comply with the provisions of the contract which compliance were conditions precedent to the establishment of any claim against the defendant; plaintiff's alleged cause of action is barred by the statute of limitations, and all were performed by the plaintiff was required by the contract of the parties agreed upon and held by defendant."

Plaintiff contends that "the trial court erred in entering judgment in favor of the defendant notwithstanding the verdict of the jury in favor of the plaintiff. The trial court had no authority to weigh and determine controverted questions of fact."

In Timmons v. Timmons, 301 Ill. 19, the court states (p. 25, 26): "The verdict of a jury in a will contest has the same force and effect as the verdict of a jury in an action at law." (That v. Timmons County Children's Home, 211 Ill. 29; Timmons)

v. University of Illinois, 251 Ill. 48,) and motions for a directed verdict or a judgment notwithstanding the verdict are governed by the same rules which govern such motions in an action at law. The only question in such a case is whether there is any evidence in the record tending to prove the allegations of the complaint. The party resisting such motions is entitled to the benefit of all the evidence favorable to him. Hunt v. Vermilion County Children's Home, 381 Ill. 29; Ryan v. Deneen, 375 Ill. 452; Ginsberg v. Ginsberg, 361 Ill. 499; Greenelees v. Allen, 341 Ill. 262.

"Where the evidence, taken in its aspects most favorable to the contestant, together with all reasonable presumptions and inferences to be drawn therefrom, tends to establish the allegations of his complaint, the issue should not be withdrawn from the jury. (Peters v. Peters, 376 Ill. 237; Ginsberg v. Ginsberg, 361 Ill. 499.) So, a motion for judgment notwithstanding the verdict, under the Civil Practice Act, raises the same question of law and has the same effect as a motion for a directed verdict. Neither the trial court, nor this court on review, is permitted to weigh the evidence to determine where the preponderance lies. In other words, if the plaintiff's evidence makes out a prima facie case, sufficient in itself to go to the jury, the motion must be denied. (Walaite v. Chicago, Rock Island and Pacific Railway Co., 376 Ill. 59; Froehler v. North American Life Ins. Co., 374 Ill. 17.) Evidence favorable to plaintiff's case is all that can be considered on such an inquiry."

In Ginsberg v. Ginsberg, 361 Ill. 499, the court states (p. 508): "A motion to direct a verdict in a will contest has been held to be governed by the same rules as govern such motions made in actions at law. (Brownlie v. Brownlie, 351 Ill. 72, 78; McCune v. Reynolds, 288 id. 188, 190.) The party resisting such a motion

v. University of Illinois, 251 Ill. 48, and motions for a directed verdict or a judgment notwithstanding the verdict are governed by the same rules which govern such motions in an action at law. The only question in such a case is whether there is any evidence in the record tending to prove the allegations of the complaint. The party resisting such motions is entitled to the benefit of all the evidence favorable to him. West v. Vermilion County Children's Home, 301 Ill. 29; Evans v. Hansen, 375 Ill. 452; Ginsburg v. Ginsburg, 301 Ill. 499; Greenleaf v. Allen, 341 Ill. 362.

"Where the evidence, taken in its aspects most favorable to the contestant, together with all reasonable inferences and inferences to be drawn therefrom, tends to establish the allegations of his complaint, the issue should not be withdrawn from the jury. (Peters v. Peters, 376 Ill. 237; Ginsburg v. Ginsburg, 301 Ill. 499.) So, a motion for judgment notwithstanding the verdict, under the Civil Practice Act, raises the same question of law and has the same effect as a motion for a directed verdict. Neither the trial court, nor this court on review, is permitted to weigh the evidence to determine where the preponderance lies. In other words, if the plaintiff's evidence makes out a prima facie case, sufficient in itself to go to the jury, the motion must be denied. (Walsh v. Chicago, Rock Island and Pacific Railway Co., 376 Ill. 59; Froehner v. North American Life Ins. Co., 374 Ill. 17.) Evidence favorable to plaintiff's case is all that can be considered on such an inquiry."

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is entitled to the benefit of all the evidence, considered in its aspect most favorable to him, together with all reasonable presumptions to be drawn therefrom. The motion raises the question whether there is any evidence fairly tending to prove the allegations of the bill. If such evidence has been educed, although it may be opposed by the greater weight of the counter-vailing testimony, the case should be submitted to the jury. (Brownlie v. Brownlie, 351 Ill. 72, 78; Miles v. Long, 342 id. 589.)"

Defendant contends, apparently, that the foregoing rules do not apply to the instant case because it is based upon charges of fraud and deceit. It argues that "a greater degree of evidence is required in order to successfully prove an action of fraud and deceit," and that "the plaintiff failed to prove fraud and deceit with the quantum of proof necessary to establish clear, convincing, and unequivocal evidence." Defendant's contention, as we understand it, is: That in order to make out a prima facie case plaintiff was obliged to prove the charges of fraud and deceit by clear and convincing evidence, and that the trial court in passing upon the motion for judgment non obstante veredicto had the right to determine if plaintiff had made out a prima facie case by the required quantum of proof; that the trial court found that plaintiff failed in that regard and therefore the court was justified in entering judgment non obstante veredicto. The obvious vice of this contention is that it permits the trial judge to weigh the evidence and to pass upon the credibility of the witnesses in order to ascertain the facts, in passing upon a motion for judgment non obstante veredicto. We need not cite the many decisions of the Supreme court in which that court has emphatically stated that neither the trial court nor an appellate court on review, in passing upon a motion for judgment

is entitled to the benefit of all the evidence, considered in its aspect most favorable to him, together with all reasonable presumptions to be drawn therefrom. The motion raises the question whether there is any evidence fairly tending to prove the allegations of the bill. If such evidence has been adduced, although it may be opposed by the greater weight of the contrary testimony, the case should be admitted to the jury. (Brown v. Brown, 351 Ill. 72, 78; Allen v. Jones, 342 Ill. 372.)

Defendant contends, apparently, that the foregoing rules do not apply to the instant case because it is based upon charges of fraud and deceit. It argues that "a greater degree of evidence is required in order to successfully prove an action of fraud and deceit," and that "the plaintiff failed to prove fraud and deceit with the quantum of proof necessary to establish clear, convincing, and unequivocal evidence." Defendant's contention, as we understand it, is: That in order to make out a prima facie case plaintiff was obliged to prove the charges of fraud and deceit by clear and convincing evidence, and that the trial court in passing upon the motion for judgment non obstante veritate had the right to determine if plaintiff had made out a prima facie case by the required quantum of proof; that the trial court found that plaintiff failed in that regard and therefore the court was justified in entering judgment non obstante veritate. The obvious vice of this contention is that it permits the trial judge to weigh the evidence and to pass upon the credibility of the witnesses in order to ascertain the facts, in passing upon a motion for judgment non obstante veritate. We need not cite the many decisions of the supreme court in which that court has emphatically stated that neither the trial court nor an appellate court on review, in passing upon a motion for judgment

non obstante veredicto is permitted to weigh the evidence, and that the question presented is whether there is any evidence which, taken with its intendments most favorable to plaintiff, tends to prove the charge of the complaint. If defendant's contention were sustained that ruling would deprive plaintiff of its right to a trial by jury. A trial court has the right to weigh the evidence where it passes upon a motion for a new trial. In support of its contention defendant cites Tribune Co. v. Thompson, 342 Ill. 503; Michuda v. Sanitary District, 305 Ill. App. 314, and a number of kindred cases. In Tribune Co. v. Thompson, Thompson and others were charged, in a bill in chancery, with conspiring to defraud the City of Chicago of large sums of money. The case was tried by the chancellor, who found the defendants guilty, and the question before the Supreme court was whether, upon the entire evidence, the finding was warranted. It was held that the complainant was bound to prove the charge of conspiracy against the defendants by clear and convincing evidence, and that it failed to do so. The Michuda case was heard by the trial court without a jury, and the Appellate court, upon appeal, passed upon the entire evidence. Defendant cites no case involving a judgment non obstante veredicto. However, if we adopt, solely for the purposes of this appeal, the strained argument of defendant that the trial court, in passing upon the motion in question, had the right to determine whether plaintiff had made out a prima facie case by clear and convincing evidence it is certain that the court, in determining that question, could consider only the evidence favorable to plaintiff's case.

We have noted that counsel for defendant, in their zeal to have the judgment of the trial court sustained, have not adhered, in their argument, to the rules that governed the trial court in passing upon the motion in question, and that govern this court in passing upon his judgment. Indeed, defendant's counsel criticize plaintiff's counsel for not mentioning, in their argument, certain

non obstante veritas is permitted to weigh the evidence, and that the question presented is whether there is any evidence which, taken with the other evidence most favorable to plaintiff, tends to prove the charge of the complaint. If defendant's contention were sustained, the finding would deprive plaintiff of its right to a trial by jury. A trial court has the right to weigh the evidence where it passes upon a motion for a new trial. In support of its contention defendant cited Winters v. Winters, 342 Ill. 503; Winters v. Winters, 307 Ill. 111, 112, 113, and a number of similar cases. In Winters v. Winters, Thompson and others were charged, in a bill in equity, with conspiring to defraud the City of Chicago of large sums of money. The case was tried by the chancellor, who found the defendants guilty, and the question before the Supreme Court was whether, upon the entire evidence, the finding was warranted. It was held that the complaint was bound to prove the charge of conspiracy against the defendants by clear and convincing evidence, and that it failed to do so. The Winters case was cited by the trial court without a jury, and the Appellate court, upon appeal, passed upon the entire evidence. Defendant cites no case involving a judgment non obstante veritas. However, if we adopt, solely for the purposes of this appeal, the strained argument of defendant that the trial court, in passing upon the motion in question, had the right to determine whether plaintiff had made out a prima facie case by clear and convincing evidence it is certain that the court, in determining that question, could consider only the evidence favorable to plaintiff's case. We have noted that counsel for defendant, in their brief, have the judgment of the trial court sustained, have not adhered, in their argument, to the rules that govern the trial court in passing upon the motion in question, and that govern this court in passing upon his judgment. Indeed, defendant's counsel criticize plaintiff's counsel for not mentioning, in their argument, certain

evidence that, defendant's counsel argue, weakened plaintiff's case. In an effort to justify its evasion of the rules defendant states: "We know this court is desirous of ascertaining the true facts * * * of the cause * * * * * * Defendant rests, confident that after a careful review of all the evidence * * * this court will find that plaintiff is only entitled to a judgment for \$2,556.90." The reason why defendant's counsel sometimes ignore the fact that this is an appeal from a judgment non obstante veredicto becomes clear when it is remembered that defendant failed to file a motion for a new trial.

Obeying the rules that govern us, we find the following evidence: On January 24, 1936, defendant advertised for bids for the construction of a project known as West Towns Outlet Sewer Contract No. 2. Plaintiff, the lowest bidder, was awarded the contract. On February 20, 1936, plaintiff and defendant entered into an agreement in writing for performing the work specified under the contract. Prior to the time that bids were received plaintiff, through Joseph E. Love, its chief engineer, obtained the proposal, plan and specifications for the project at the office of defendant. Love attended the engineering course of the University of Wisconsin, and received a degree from the Northwestern University in 1913. He is a licensed structural engineer as well as a professional engineer, and has been a consulting engineer for the City of Chicago for approximately ten years, has also been employed by the City as designing engineer, has been a structural engineer for the Chicago, Milwaukee and St. Paul Railroad, an estimate engineer for the Chicago Park District, has been associated as an engineer with various engineering firms and contractors, and is experienced in estimating the cost of work and the preparation of plans and specifications. He testified that after securing the plans and specifications from defendant he conferred with Girard, an engineer employed by defendant, and asked him for information

evidence that defendant's claims, whether plaintiff's
case. In an effort to justify its evasion of the rules defendant
and states: "Now this court is desirous of ascertaining
the true facts * * * of the case * * * * * Defendant moves
contending that after a careful review of all the evidence * * *
this court will find that plaintiff is only entitled to a judg-
ment for \$2,500.00. The reason why defendant's counsel sometimes
ignore the fact that this is an appeal from a judgment non est
is made to become clear when it is remembered that defendant
tried to file a motion for a new trial.
Obeying the rules that govern us, we find the following
evidence: On January 24, 1936, defendant advertised for bids for
the construction of a project known as West Towns United States
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the City of Chicago for approximately ten years. He also has been em-
ployed by the City as designing engineer, has been a structural
engineer for the Chicago, Milwaukee and St. Paul Railroad, an
estimate engineer for the Chicago Lake District, has been associated
as an engineer with various engineering firms and contractors, and
is experienced in estimating the cost of work and the preparation
of plans and specifications. It is testified that after receiving the
plans and specifications from defendant he conferred with plaintiff,
an engineer employed by defendant, and asked him for information

regarding the soil, and that he was given a soil information blue print (plaintiff's Exhibit 6) at defendant's office; that he made copies of the same at that time. William H. Trinkaus, chief engineer for defendant, testified that plaintiff's Exhibit 6 "is the Soil Information Plan exhibited to the contractor at or about the time that bids were taken for this work." Walter H. Faget, assistant chief engineer for defendant, testified, referring to plaintiff's Exhibit 6, that "that was the blue print exhibited to the contractors prior to the taking of bids on this contract." In the "Requirements For Bidding And Instructions to Bidders" proposal given to bidders upon the contract, all bidders were required to examine said blue print and plaintiff was required to make an affidavit that it had examined it. The soil information blue print classified the various subsurface soil strata along the route of the work and specified the elevations and locations where the different types of soil were found. It described the soil in the area within which the tunnel was to be constructed as consisting of clay, varying from stiff or hard clay to sandy clay. At the time the said blue print was shown plaintiff defendant had in its possession certain test boring records that had been made by it which showed that the soil in the area within which the tunnel was to be constructed between 25th and 22d streets on East avenue, Berwyn, consisted of medium loam, blue loam and loam. Love testified that he was not shown any other "plan" relating to the soil information or ground in East avenue between 31st street and Roosevelt road, Berwyn; that he was not shown the documents marked plaintiff's Exhibit 7, 7A, 8, 8A, 9, 9A, 10, and 10A, which were the test boring records prepared by defendant. Walter H. Faget, assistant chief engineer for defendant, testified: "Referring to Plaintiff's Exhibit 7 in evidence, 7A, 8, 8A, 9, 9A, and 10 and 10A, the contractor was not shown that information

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blue print (plaintiff's Exhibit 6) as defendant's exhibit; that
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showed that the soil in the area within which the tunnel was to
be constructed between 22nd and 23rd streets on East Avenue,
Newark, consisted of red loam, blue loam and loess. I have
testified that he was not shown any other "plan" relating to
the soil information or ground in East Avenue between 22nd street
and Loosvelt road, Newark; that he was not shown the documents
marked plaintiff's Exhibit 7, 8, 9, 10, 11, 12, 13, 14, 15, and 16A,
which were the test boring records prepared by defendant. Walter
E. Tinsley, assistant chief engineer for defendant, testified,
referring to plaintiff's Exhibit 7 in evidence, 7A, 8, 9,
10A, and 11 and 12A, the contractor was not shown that information

prior to the time bids were accepted on this work." In plaintiff's reply to defendant's answer it alleged that the boring records and reports made and prepared by defendant's engineer, one William J. Powers, prior to December, 1935, have ever since been in the custody, control and possession of defendant and were by said defendant concealed and withheld from plaintiff until plaintiff's discovery of said boring records in December, 1943. Defendant filed no answer denying the matters set forth in plaintiff's reply. Love further testified that in preparing his estimate for the doing of the work he relied upon the information shown on the soil information blue print and that his estimate was based upon a particular method of construction. "It was to work in tunnel ^{and} free air tunnel. In free air there is a direct connection at all times between the heading and the shaft and the outside air, so that the air outside and inside is at the same pressure. In other words, you are working under normal atmospheric pressure." In response to a question as to what method of construction he would have based his estimate on had he been shown plaintiff's Exhibits 7 to 10, both inclusive, the test boring records, Love testified that "good engineering practice would indicate that the method for the doing of that work would be free air with the exception of certain locations where compressed air would be used. I said compressed air would be needed in that portion of the tunnel approximately between 25th street north of 25th street and even to 22nd street - maybe not quite 22nd street. The indications on the test pit boring records lead me to that. They are Exhibits 7 to 10. I have stated my opinion based upon my experience as an engineer that the standard engineering practice would require me to do certain portions of this work under compressed air." The test boring records were prepared by William J. Powers, defendant's engineer. There is evidence that the information shown on the test boring records was obtained from test

Prior to the time this was accepted on this work. In plain-
tiff's reply to defendant's answer it alleged that the boring
records and reports made and prepared by defendant's engineer,
one William J. Power, prior to December, 1947, have ever since
been in the custody, control and possession of defendant and were
by said defendant concealed and withheld from plaintiff until
plaintiff's discovery of said boring records in December, 1947.
Defendant filed no answer denying the matters set forth in plain-
tiff's reply. Love further testified that in preparing his
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shown on the said information like print and that his estimate
was based upon a particular method of construction. "It was to
work in tunnel - from air tunnel. In fact there is a direct
connection at all times between the boring and the shaft and
the outside air, so that the air outside and inside is at the
same pressure. In other words, you are working under normal
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25th street and even to that street - maybe not quite 25th street.
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They are Exhibits 7 to 10. I have stated my opinion based upon
my experience as an engineer that the standard engineering practice
would require me to do certain portions of this work under com-
pressed air." The test boring records were prepared by William
J. Power, defendant's engineer. There is evidence that the in-
formation shown on the test boring records was obtained from test

pits made by defendant at various points along the route of the proposed work; that the test pits were from three to four feet in diameter and extended from the surface of the ground to a point below the invert or bottom of the proposed sewer. Powers testified: "I laid out on No. 2 (West Towns Outlet Sewer Contract #2) where the test pits were to be dug for the District and supervised the construction and digging of them. The test pits for West Towns Sewer Outlet Contract No. 2 were made up under my supervision. Samples were taken of the soil at different locations when that test pit was being dug. I had a number of different men with me as employees of the Sanitary District in making those test pits. On that particular job I had 6 or 8. Two of them were graduate engineers; I think Mr. Fitzgerald is one of them. I think I had a graduate engineer on that by the name of O'Neill. Another man was a graduate engineer. His name was Hughes"; that "I had six or eight men under me for the purpose of obtaining samples at these test pits. I have been doing that kind of work for a long time, for many years. On No. 2 I think I had three test pits running at the same time, two or three anyway. It is the duty of the inspectors at any one of those pits to take samples of the subsurface soils at different elevations, and to make a note as to what it is and to put that specimen in a jar. The inspectors have a field book. They use that field book to record in their own handwriting the information as to the soil"; that "before I do that I make out the test boring records in my place at 31st and Western and I ^{that} make out from the field books of the inspectors and from the information in the jars. I inspect every jar myself. When I complete my test boring records and send this stuff downtown I am through so far as that job is concerned"; that "in connection with the making out of the labels designating the contents of

pits made by defendant at various points along the route of the proposed work; that the test pits were from three to four feet in diameter and extended from the surface of the ground to a point below the invert or bottom of the proposed sewer. Lower testified: "I laid out on No. 2 (West Towns Outlet Sewer Contract No. 2) where the test pits were to be dug for the District and supervised the construction and digging of them. The test pits for West Towns Sewer Outlet Contract No. 2 were made up under my supervision. Samples were taken of the soil at different locations when the test pit was being dug. I had a number of different men with me as employees of the District in making those test pits. On that particular job I had 6 or 8. Two of them were graduate engineers; I think Mr. Fitzgerald is one of them. I think I had a graduate engineer on that by the name of O'Neill. Another man was a graduate engineer. His name was Hughes; that I had six or eight men under me for the purpose of obtaining samples at these test pits. I have been doing that kind of work for a long time, for many years. On No. 2 I think I had three test pits running at the same time, two or three anyway. It is the duty of the inspectors at any one of those pits to take samples of the subsurface soils at different elevations, and to make a note as to what it is and to put that specimen in a jar. The inspectors have a field book. They use that field book to record in their own handwriting the information as to the soil; that 'before I do that I make out the test boring records in my place at East and Western and I make out from the field books of the inspectors and from the information in the jars. I inspect every jar myself. When I complete my test boring records and send this stuff down I am through so far as that job is concerned; that 'in connection with the making out of the labels designating the contents of

those jars I have used the word loam before. I used that word quite a long time." Trinkaus, defendant's chief engineer, testified that "it is customary for the Sanitary District of Chicago to make test pits or borings before taking bids. The purpose of making test pits and borings is to determine the nature of the soil, so that the structure can be designed properly. In addition, it enables The Sanitary District to make estimates, so that when bids are received the bids can be compared with the estimates prepared by the Department"; that "the Sanitary District made estimates of the cost of this work. That was done before bids were taken." John W. Towne, defendant's assistant engineer of Sewer Design and a witness for defendant, testified that "referring to defendant's Exhibit 8 for identification, this is the original tracing of the soil information for West Towns Outlet Sewer Contract Nos. 1, 2, 3. The original boring information was compiled by Mr. Powers and it was transferred to Defendant's Exhibit 8 exactly as it was recorded on the boring records. There were changes made on this Defendant's Exhibit 8 after such original compilation was made on Defendant's Exhibit 8. I made those changes personally. Those changes on Defendant's Exhibit 8 are principally along East Avenue. Identifying them on the sheet the original description used was loam"; that "when the tracing was prepared to correspond to the original boring record we submitted it to Mr. Eltinge [defendant's engineer of Sewer Design] for his approval"; that "Alfred Cassey [then an employee of defendant] had prepared the original (tracing) up to the point of inking it in, putting on all the designations and the numbers and letters and everything else and then I saw the original tracing. Mr. Cassey and I back checked the original tracing with the source of information as to the test pits, so when it was first prepared I saw the words loam and blue loar

those days I have used the word loan before. I used that word quite a long time." Triliana, defendant's chief engineer, testified that "it is customary for the Sanitary District of Chicago to make test pits or borings before taking bids. The purpose of making test pits and borings is to determine the nature of the soil, so that the structure can be designed properly. In addition, it enables The Sanitary District to make estimates, so that when bids are received the bids can be compared with the estimates prepared by the Department"; that "the Sanitary District made estimates of the cost of this work. That was done before bids were taken." John W. Towne, defendant's assistant engineer of Sewer Design and a witness for defendant, testified that "referring to defendant's Exhibit 8 for identification, this is the original tracing of the soil information for West Towne Outlet Sewer Contract Nos. 1, 2, 3. The original boring information was compiled by Mr. Powers and it was transferred to defendant's Exhibit 8 exactly as it was recorded on the boring records. There were changes made on this defendant's Exhibit 8 after each original compilation was made on defendant's Exhibit 8. I made those changes personally. Those changes on defendant's Exhibit 8 are principally along East Avenue. Identifying them on the sheet the original description used was loan"; that "when the tracing was prepared to correspond to the original boring record we submitted it to Mr. [Triliana] (defendant's engineer of Sewer Design) for his approval"; that "Alfred Cassey (then an employee of defendant) had prepared the original (tracing) up to the point of linking it in, putting on all the designations and the numbers and letters and everything else and then I saw the original tracing. Mr. Cassey and I both checked the original tracing with the source of information as to the fact of it. When it was first prepared I saw the words loan and also loan

and other kinds of loam which appeared from the test boring records. They were all on the sheet"; that "as to Contract No. 2, wherever the word loam appeared originally on that sheet I erased that and substituted some other word. After I erased the word loam and substituted sandy clay I did that at the direction of Mr. Eltinge"; that "I substituted those other words on this sheet about a week after I made the original tracing. I knew that this soil information sheet was a sheet that was intended to be given to the bidders on this proposed job. I knew the purpose of making up the sheet, or one of the purposes. I did not ever inform any of the bidders on this job that I had substituted on this soil information sheet the words which were different from the words on the test boring records"; that "in making up the original tracing of this kind it is not customary for these blank spaces to be filled in by the person checking the record or examining it. It is sometimes done. I did not put my name anywhere on this original tracing. Mr. Eltinge did not put his name anywhere on this original tracing or any one else except Mr. Cassey, and he is dead." In defendant's brief counsel describe the changes made by Towne as follows: "He [Towne] transferred the original information from the boring records to the tracing and then upon the direction of Mr. Eltinge, he personally made certain changes on the tracing. These changes were for Test Pit 7B(23) at elevation plus 9.8 to plus 5.1 'Loamy blue clay' was changed to 'sandy blue clay' and from plus 5.1 to 2.8 'Loamy clay' to 'sandy clay'; Test Pit 8(24) at plus 12.1 to 5.3 'medium hard loam' was changed to 'medium hard sandy clay'. and from plus 5.3 to minus 0.32, 'loam' was changed to 'sandy clay'; Test Pit 9(25) at plus 2.2 to minus 2.0, 'blue loam' changed to 'blue sandy clay'; Test Pit No. 10(26), at plus to plus 4.6, 'medium black loam' was changed to 'medium

and other kinds of loam which appeared from the test boring records. They were all on the sheet; that is to say, they were all on the sheet which appeared originally on that sheet. I erased that and substituted some other word. After I erased the word loam and substituted sandy clay I did that as the direction of Mr. Wiggins; that is, I substituted those other words on this sheet about a week after I made the original tracing. I know that this old information sheet was a sheet that was intended to be given to the officers on this proposed job. I knew the purpose of taking in the sheet, or one of the purposes. I did not even inform any of the officers on this job that I had substituted on this old information sheet the words which were different from the words on the test boring records; that is, in making up the original tracing of this kind it is not customary for these blank spaces to be filled in by the person checking the record or examining it. It is sometimes done. I did not put my name anywhere on this original tracing. Mr. Wiggins did not put his name anywhere on this original tracing or any one else except Mr. Cassey, and he is dead. In defendant's brief counsel describe the changes made by Towne as follows: "He [Towne] transferred the original information from the boring records to the tracing and then upon the direction of Mr. Wiggins, he personally made certain changes on the tracing. These changes were for Test Pit 7(23) at elevation plus 2.8 to plus 2.1 'loamy blue clay' was changed to 'sandy fine clay' and from plus 2.1 to 2.8 'loamy clay' to 'sandy clay'; Test Pit 8(24) at plus 12.1 to 5.3 'medium hard loam' was changed to 'medium hard sandy clay'; and from plus 5.3 to minus 0.32, 'loam' was changed to 'sandy clay'; Test Pit 9(25) at plus 2.2 to minus 2.0, 'blue loam' was changed to 'blue sandy clay'; Test Pit 10(26) at plus 4.6, 'medium black loam' was changed to 'medium

sandy clay'; Test Pit 11(27) at plus 22 to plus 10.2 'hard loam' was changed to 'hard sandy clay' and at plus 5.9 to plus 3.0, 'loam' was changed to 'sandy clay.'"

The evidence shows that before commencing operations plaintiff submitted a proposed method of procedure to be used in building the structures specified in the contract; that the method of procedure "consists of sinking shafts at 16th and East Avenue and at 26th street and East avenue, installing elevators, furnishing compressors, excavating tools, equipment and appurtenances"; that the work to be performed by plaintiff was what is known as the free air method; that this method was the proper way of constructing a tunnel in ground where the soils were as described on the soil information blue print. The method of procedure proposed by plaintiff was approved by defendant, and thereafter plaintiff commenced operations upon the contract. There is evidence that shows that as the work progressed in the north heading out of the shaft located at 26th street and East avenue, Berwyn, plaintiff encountered sand at the invert of the tunnel at or near 25th street and East avenue; that there was a predominance of sand in loam; that when loam is saturated with water it produces a condition known as quicksand. The evidence shows that the rate of progress of the work north from 25th street and East avenue was reduced from 30 feet to 12 feet a day, then to 10 feet a day, and then to 8 feet a day; that as the work continued north in the tunnel from 25th street the sand in the invert increased in thickness and water was encountered; that the rate of progress of the work was daily reduced until a certain point was reached at or near 24th street, where plaintiff was compelled to suspend operations; that the depth of the sand encountered in the tunnel between 25th and 24th streets was determined by inserting a reinforcing rod 16 feet in length into the invert; that the rod sank without hesitation and the condition

sandy clay; Test No. 11(77) at pins 22 to 24 is also sandy clay; Test No. 12(77) at pins 25 to 27 is also sandy clay; and at pins 28 to 30 is also sandy clay.

The evidence shows that before commencing operations plaintiff submitted a proposed method of procedure to be used in building the structure specified in the contract; that the method of procedure "consists of sinking shafts at 10th and East Avenues and at 25th Street and East Avenue, installing elevators, furnishing compressors, excavating tools, equipment and apparatus; that the work to be performed by plaintiff was what is known as the free air method; that this method was the proper way of constructing a tunnel in ground where the soils were as described on the soil information blue print. The method of procedure proposed by plaintiff was approved by defendant, and thereafter plaintiff commenced operations upon the contract. There is evidence that shows that as the work progressed in the north heading out of the shaft located at 25th Street and East Avenue, plaintiff encountered sand at the invert of the tunnel at or near 25th Street and East Avenue; that there was a predominance of sand in place; that when sand is saturated with water it produces a condition known as quicksand. The evidence shows that the rate of progress of the work north from 25th Street and East Avenue was reduced from 50 feet to 12 feet a day, then to 10 feet a day, and then to 8 feet a day; that as the work continued north in the tunnel from 25th Street the sand in the invert increased in thickness and water was encountered; that the rate of progress of the work was fully reduced until a certain point was reached at or near 24th Street, where plaintiff was compelled to suspend operations; that the depth of the sand encountered in the tunnel between 25th and 24th Streets was determined by inserting a reconnaissance rod 15 feet in length into the invert; that the rod sank without hesitation and the condition

of the soil in the invert of the tunnel at this point was quicksand; that the soil information blue print showed clay designations in the invert between 25th and 22d streets on East avenue; that the test boring records showed loam, medium loam and blue loam in the invert of the tunnel between these points. Faget, defendant's assistant chief engineer (called under Sec. 60 of the Practice Act), testified that three or four times a week he visited the work being done by plaintiff during the operation and that in his opinion the work done by plaintiff "was done in a workmanlike way," that on his visits to the work he had occasion to observe the nature of the soil at 22d street and Roosevelt road; that loam was encountered between 26th and 24th streets and between 24th and 22d streets. Plaintiff offered to prove by Faget that "The Sanitary District prior to the opening of bids on this job, through its Engineering Department, made an estimate of the cost of doing this work, that such estimate was in the neighborhood of \$1,250,000; that in making up such estimate the Engineering Department of the Sanitary District based the same upon the records known as the test boring records which showed the presence of loam at certain places along, or through which the work was to be done, and based upon the information contained in the test boring records the Sanitary District included in its estimate the cost of doing the work by use of compressed air," but defendant's objection to the offer was sustained. We think that the court erred in sustaining the objection to this offer of evidence, which tends to show that the engineers of defendant believed that the proposed work had to be done by the use of compressed air and that their belief was based upon the information contained in the test boring records. The offered evidence also tends to show that defendant's engineers knew that plaintiff was deceived by the information

of the soil in the tunnel at this point was
quickly; that the soil information blue print showed clay
deposition in the interval between 24th and 25th streets on
East Avenue; that the test boring records showed loose, medium
loam and blue loam in the interval of the tunnel between these
points. Next, defendant's assistant chief engineer (called
under seal, so of the records etc.), testified that three or
four times a week he visited the work being done by plaintiff
during the operation and that in his opinion the work done by
plaintiff "was done in a workmanlike way," that on his visits
to the work he had occasion to observe the nature of the soil
at 22d street and Roosevelt road; that loam was encountered
between 20th and 24th streets and between 24th and 25th streets.
Plaintiff offered to prove by Peter that the Sanitary District
prior to the opening of bids on this job, through its Engineering
Department, made an estimate of the cost of doing this work, that
such estimate was in the neighborhood of \$1,250,000; that in
making up such estimate the Engineering Department of the Sanitary
District based the same upon the records known as the test boring
records which showed the presence of loam at certain places along
or through which the work was to be done, and based upon the in-
formation contained in the test boring records the Sanitary
District included in its estimate the cost of doing the work by
use of compressed air," but defendant's objection to the offer
was sustained. He thinks the court erred in sustaining the
objection to this offer of evidence, which tends to show that
the engineers of defendant believed that the proposed work was
to be done by the use of compressed air and that their belief
was based upon the information contained in the test boring
records. The offered evidence also tends to show that defendant's
engineers knew that plaintiff was deceived by the information

contained in the soil information blue print, as plaintiff's bid and its plan of operation, which was approved by defendant's engineers, were based upon the theory that the work could be done in a "free air tunnel," that is, that the work could be done "under normal atmospheric pressure." The offered evidence further tends to show that if plaintiff had known of the "test pit boring records" it would have made a much larger bid, based upon the assumption that certain portions of the work would have to be done under compressed air. The offered evidence was especially material and important in view of the position taken by defendant that the so-called soil information blue print "was not made with intent to induce or influence the plaintiff to act upon it, but on the contrary the statement and the provisions of the contract as a whole indicate that the statement was not made with such intent; that the statement of belief expressed on the soil information blue print was not known to the defendant to be false." However, the error of the trial court in sustaining the objection to the offer may be ignored in the determination of the question before us. Trinkaus testified that "the work done under the contract known as West Towns Outlet Sewer Contract No. 2 was completed in accordance with the plans prepared by The Sanitary District, or where the plans were changed or modified in accordance with the changes or modifications and was completed to my entire satisfaction as Chief Engineer of The Sanitary District of Chicago"; that he "was completely satisfied with the finished structure known as West Towns Outlet Sewer Contract No. 2." Trinkaus also testified that there is a distinction between loam and clay; that loam itself is light grained and homogenous; that it does not cohere or adhere like clay; that it lacks cohesive quality; that clay has elasticity and you are able to mass it. George H. Otto, called by plaintiff, testified that he

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and its plan of operation, which was approved by defendant's
engineers, were based upon the theory that the work could be
done in a "free air tunnel," that is, that the work could be
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air boring records" it would have made a much larger bid, based
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ially material and important in view of the position taken by
defendant that the so-called soil information blue print "was
not made with intent to induce or influence the plaintiff to
act upon it, but on the contrary the statement and the provisions
of the contract as a whole indicate that the statement was not
made with such intent; that the statement of soil conditions on
the soil information blue print was not known to the defendant
to be false." However, the error of the trial court in sustaining
the objection to the offer may be ignored in the determination
of the question before us. Trimmer testified that "the work done
under the contract known as West Towns Relief Sewer Contract No. 2
was completed in accordance with the plans prepared by the
Sanitary District, or where the plans were changed or modified
in accordance with the changes or modifications and was completed
to my entire satisfaction as Chief Engineer of the Sanitary
District of Chicago"; that he "was completely satisfied with the
finished structures known as West Towns Relief Sewer Contract No. 2." Trimmer also testified that there is a distinction between
loam and clay; that loam itself is light colored and porous;
that it does not compact or adhere like clay; that it lacks
cohesive quality; that clay has elasticity and you are able to
mass it. George W. Otto, called by plaintiff, testified that he

was a geologist connected with the Illinois Institute of Technology where he teaches a course in engineering geology; that he was a member of the Armour Research Foundation; that he specialized in the application of geology to engineering, particularly civil engineering; that he is the author of works on the subject of the kind of geology that is found around Chicago; that "with respect to engineers in the Chicago region, the term loam refers to a silt that is nonplastic in character. Silt consists of particles finer than sand and coarser than clay particles. Some of you would call it extremely fine sand"; that "I will explain that sandy clay would be sufficiently coherent to stand up in most places; that it would contain occasional boulders"; that "from an engineering standpoint I would expect to find in sandy clay, from the standpoint of sand, that it would stand up without undue difficulty"; that "supposing I saw the term loam and sandy clay used on different test pit borings on the same blue print, I would expect to encounter different materials in the area in which those borings were made. If I found loam in one place I would expect to find the silt that I referred to. If I found sandy clay I would expect to find predominantly clay material, and which are quite different ones"; that "there is a distinction and recognized difference in those two terms as used in the engineering and geological field. The difference refers to the type of deposit that a geologist calls till, which is an unstratified type of clay relatively uniform and dependable in character. The term loam refers to silt component highly stratified and as such may be expected to vary greatly. It is deposited by running water. The terms blue loam and loam appearing on the boring record for Pit No. 9 and the words appearing on the soil information sheet at that elevation have a distinct meaning, or rather a distinct difference :

was a geologist connected with the Illinois Institute of Technology where he teaches a course in engineering geology; that he was a member of the Arthur Hays Sulzberger Foundation; that he specialized in the application of geology to engineering, particularly civil engineering; that he is the author of works on the subject of the kind of geology that is found around Chicago; that "with respect to engineers in the Chicago region, the term loam refers to a silt that is homogeneous in character. It consists of particles finer than sand and coarser than clay particles. Some of you would call it extremely 'fine sand'; but I will explain that sandy clay would be a rather highly coherent to stand up in most places; that it would contain occasional 'boulders'; that 'from an engineering standpoint I would expect to find in any clay, from the standpoint of sand, that it would stand up without undue difficulty'; that 'supposing I saw the term loam and sandy clay used on either of test pit borings on the same fine print, I would expect to encounter different materials in the areas in which these borings were made. If I found loam in one place I would expect to find the silt that I referred to. If I found sandy clay I would expect to find predominantly clay material, and which are quite different ones'; that 'there is a distinction and recognized difference in those two terms as used in the engineering and geological field. The difference refers to the type of deposit that a geologist calls 'silt', which is an unstratified type of clay relatively uniform and separable in character. The term loam refers to silt component highly stratified and as such may be expected to vary greatly. It is deposited by running water. The term fine sand and loam appearing on the boring record for pit No. 9 and the words appearing on the soil information sheet at that level to have a distinct meaning, or rather a distinct difference."

in the engineering and geological field. I wish to emphasize that hard blue clay and grit I would interpret to be a glacial till and there would be no particular trouble anticipated since it is hard. I would anticipate trouble with conditions known to exist as blue loam and loam and I would anticipate that we must be on the lookout for a rapid gradation of material." Work was suspended at 24th street from February 1 to March 10, 1937.

Trinkauss testified that the work was suspended because large quantities of water were entering the headings and appeared in the tunnel at different places, - at times in the roof, at times in the side, and often up through the bottom. It appears that during that period plaintiff submitted to defendant a new and different method of procedure for the completion of the remaining portion of the work between 24th and 22d streets on East avenue Berwyn, which method was approved by defendant. It required the installation of an additional shaft, air locks, reducing valves, signalling devices and the furnishing of low pressure compressors and other equipment necessary to conduct operations under compressed air. The design of the tunnel was changed by increasing the thickness of the concrete in the invert and by including additional reinforcing steel. The proposed change was designated "Special Section for soft ground in bottom of tunnel." Trinkauss also testified that defendant, at the request of plaintiff, "made arrangements to check the additional cost for performing this work under compressed air."

In instructing the jury the trial court gave, inter alia the following instructions:

"The Court instructs the jury that if you believe from preponderance of the evidence and under the instructions of the Court that the defendant misrepresented the soil conditions to be encountered in the performance of the work under the contract and that such misrepresentation was in the form of a state

in the engineering and geological fields. I wish to emphasize that hard blue clay and grit I would anticipate to be a glassy till and there would be no particular trouble anticipated since it is hard. I would anticipate trouble with conditions known to exist as blue loam and loam and I would anticipate that we must be on the lookout for a rapid variation of material. Work was suspended at 24th Street from February 1 to March 10, 1937. Trinius testified that the work was suspended because large quantities of water were entering the headings and appeared in the tunnel at different places, - at times in the roof, at times in the side, and often up through the bottom. It appears that during that period Trinius testified to defendant a new and different method of proceeding for the completion of the remaining section of the work between 24th and 32d Streets on East Avenue Parkway, which method was approved by defendant. It required the installation of an additional shaft, six locks, reducing valves, signaling devices and the furnishing of low pressure compressors and other equipment necessary to conduct operations under compressed air. The bottom of the tunnel was changed by increasing the thickness of the concrete in the invert and by installing additional reinforcing steel. The proposed change was designated "Special Section for soft ground in bottom of tunnel." Trinius also testified that defendant, at the request of plaintiff, "made arrangements to check the additional cost for performing this work under compressed air." In instructing the jury the trial court gave, inter alia, the following instructions:

"The Court instructs the jury that if you believe from the preponderance of the evidence and under the instruction of the Court that the defendant misrepresented the soil conditions to be encountered in the performance of the work under the contract and that such misrepresentation was in the form of a state

of fact, and if you believe from the evidence that the misrepresentation was made for the purpose of influencing the plaintiff to act, and if you believe from the evidence that the soil information furnished by defendant was untrue and known by the defendant to be untrue, and if you further believe that the soil information furnished by defendant was believed to be true and was relied on by plaintiff and was material in preparing plaintiff's proposal for the doing of said work under the contract, then you are instructed that plaintiff is entitled to recover from the defendant in this case.

"The Court instructs the jury that the burden is on the plaintiff to prove fraud and deceit as charged in the allegations of the complaint; and in order to prove fraud and deceit as alleged, the following essentials of fraud must be proven:

"1. That the misrepresentation must be, in form, a statement of fact.

"2. It must be made for the purpose of influencing the other party to act.

"3. It must be untrue.

"4. The party making the statement must know or believe it to be untrue.

"5. The person to whom it is made must believe and rely on the statement.

"6. The statement must be material.

"If the plaintiff failed to prove, or has failed to prove any one or all of these essentials, the jury must find the issue in favor of the defendant.

"The Court instructs the jury that fraud is never presumed, but must be proved by clear and convincing evidence, and that before the plaintiff can recover in this case, it is required by law to establish fraud as alleged by clear and convincing evidence. If you find from the evidence that plain

of fact, and if you believe from the evidence that the misrepresentation was made for the purpose of influencing the plaintiff to act, and if you believe from the evidence that the information furnished by defendant was untrue and known by the defendant to be untrue, and if you further believe that the information furnished by defendant was believed to be true and was relied on by plaintiff and was material in preparing plaintiff's proposal for the doing of said work under the contract, then you are instructed that plaintiff is entitled to recover from the defendant in this case.

The Court instructs the jury that the burden is on the plaintiff to prove fraud and deceit as charged in the allegations of the complaint; and in order to prove fraud and deceit as alleged, the following essentials of fraud must be proven: "1. That the misrepresentation must be, in form, a

statement of fact.

"2. It must be made for the purpose of influencing the other party to act.

"3. It must be untrue.

"4. The party making the statement must know or believe

it to be untrue.

"5. The person to whom it is made must believe and rely

on the statement.

"6. The statement must be material.

"If the plaintiff failed to prove, or has failed to prove

any one or all of these essentials, the jury must find the case in favor of the defendant.

The Court instructs the jury that fraud is never presumed, but must be proved by clear and convincing evidence, and that before the plaintiff can recover in this case, it is required by law to establish fraud as alleged by clear and convincing evidence. If you find from the evidence that plain

has not established ^{the} proof of fraud by such evidence, it is your duty to find the issues for the defendant."

The jury, by its verdict, found that plaintiff proved by clear and convincing evidence that defendant was guilty of the fraud and deceit charged in the complaint. We approve the verdict of the jury.

In his opinion, sustaining defendant's motion for judgment non obstante veredicto, the trial court stated: "It is my judgment that the case is controlled by the Michuda v. Sanitary District, 305. * * * I feel that the representations or misrepresentations as they may be were not representations of fact, or positive fact, as is stated in the Michuda Case, but were rather expressions of opinion." Defendant states, in its brief: "This defendant insists that the opinion of the Michuda Case is controlling here," and that the trial court was therefore justified in entering the judgment non obstante veredicto. The Michuda case was tried by the trial court and it was the duty of that court to consider and weigh all of the evidence, and to reach conclusions therefrom. The Appellate court, in reaching its judgment, considered and weighed the entire evidence and reached the conclusion (p. 359) "that the action of the court in finding against the plaintiffs * * * was proper." In considering the Michuda case it is very important to note that there was no evidence that the Sanitary District possessed, withheld or concealed material information from the contractor. The court states (p. 348):

"The next inquiry is, 'did the defendant know or believe that the information was false.' As previously outlined, there is no evidence in the record that tests and borings were made by the defendant." (Italics ours.)

The court further states (p. 333): "* * * There was no evidence as to how the Sanitary District acquired the inform

the
has not established proof of fraud by such evidence, it is your
duty to find the issues for the defendant."

The jury, by its verdict, found that plaintiff proved by
clear and convincing evidence that defendant was guilty of the
fraud and deceit charged in the complaint. We approve the
verdict of the jury.

In his opinion, sustaining defendant's motion for judgment non obstante veredicto, the trial court stated: "It is my
judgment that the case is controlled by the Michoud v. Knowlton,
District, 305. * * * I feel that the representations or misrep-
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rather expressions of opinion." Defendant states, in its brief:
"This defendant insists that the opinion of the Michoud case
is controlling here," and that the trial court was therefore
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Michoud case was tried by the trial court and it was the duty of
that court to consider and weigh all of the evidence, and to
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was no evidence that the defendant's district possessed, with-
in or concealed material information from the contractor. The court
states (p. 343):

"The next inquiry is, did the defendant know or believe
that the information was false? It is previously stated, there
is no evidence in the record that tests and borings were made
the defendant." (Italics ours.)
The court further states (p. 333): "There was no
evidence as to how the defendant obtained the information."

shown on the chart, whether from independent contractors who falsified the information, or how they got it, nor was there any evidence that the Sanitary District did not in good faith believe that the information was accurate." (Italics ours.)

In the Michuda case it also appears (p. 336) that the Sanitary District contended that the plaintiffs failed to conduct the work under their contract in a workmanlike and safe manner. In the instant case defendant's chief engineer testified that the work done under the contract was completed in accordance with the plans prepared by the Sanitary District to his entire satisfaction. In the Michuda case the Appellate court was not considering a case akin to the instant one. In our judgment the trial court in the instant case erred in holding that the Michuda case controlled his action in passing upon the motion for a judgment non obstante veredicto, and we hold that he erred in entering the judgment non obstante veredicto.

Defendant insists that in deciding this appeal we should give great weight to the rule of law that public bodies and public officers, particularly, are presumed to act honestly and in good faith. In answer to this point we may say that we must also give great weight to the fact that the jury by their verdict found that defendant did not act honestly and in good faith in its dealings with plaintiff. There is another well established principle of law that applies to the instant case, viz., a public corporation is governed by the same standards of honesty as a private corporation or citizen.

Defendant contends that the trial court was justified in holding that the representations appearing upon the soil information blue print were not representations of fact but were rather expressions of opinion, and further contends that the statement of the court that he did not believe that there was any intention on the part of defendant to defraud plaintiff was

from on the other, showing that the contract was not
fulfilled the information, or that it was there any
evidence that the contract was not in good faith
that the information was correct. (Exhibit 100.)

In the instant case it also appears (Ex. 100) that the
contract was not in good faith. The contract was not
the work under their contract in a workmanlike and safe manner.
In the instant case defendant's chief engineer testified that the
work done under the contract was completed in accordance with the
plans prepared by the plaintiff's chief engineer. In the instant
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statement of the court that he did not believe that there was
any intention on the part of defendant to defraud plaintiff was

warranted by the record.

In 12 Ruling Case Law, under the subject Fraud and Deceit, the author states (pp. 247, 248):

"There is no certain rule by the application of which it can be determined when false representations constitute matters of opinion or matters of fact, but each case must in a large measure be adjudged upon its own facts, taking into consideration the nature of the representation and the meaning of the language used as applied to the subject matter and as interpreted by the surrounding circumstances. * * * The mere fact that a statement takes the form of an expression of opinion is not always conclusive. A statement may be so expressed as to bind the person making it to its truth, though stated in the form of an opinion, and, conversely, that a matter which necessarily rests in opinion is stated positively does not make it a statement of fact. * * * When it is impossible to determine as a matter of law whether the representation is one of fact or merely the expression of an opinion, the question is generally regarded as one for the jury." (Italics ours.)

In 26 Corpus Juris, under the subject Fraud, the author states (pp. 1083, 1084):

"Whether a given representation is an expression of opinion or a statement of fact depends upon all the circumstances of the particular case, such as the form and subject matter of the representation and the knowledge, intelligence, and relation of the respective parties. The mere form of the representation as one of opinion or fact is not in itself conclusive and in cases of doubt the question should be left to jury." (Citing American Nat. Bank v. Hammond, 25 Colo. 367, 372; 55 P. 1090.) (Italics ours.)

The soil information sheet was designed to deceive plaintiff. Prior to its drafting defendant had in its possession

Warranted by the record.

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Recall, the author states (pp. 247, 248):

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37S; 52 P. 1090.) (Italics ours.)

The soil information sheet was designed to deceive plain-

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test boring records which showed that the soil in the area within which the tunnel was to be constructed between 25th and 22d streets on East avenue, Berwyn, consisted of medium loam, blue loam and loam. Towne, defendant's engineer, testified that the boring information compiled by Powers was transferred to defendant's Exhibit 8, the original tracing of the soil information sheet, exactly as it was recorded in the boring records; that he afterward made changes in Exhibit 8, after the original tracing had been "submitted to Mr. Eltinge [defendant's engineer of Sewer Design] for his approval"; that "at the direction of Mr. Eltinge" he "substituted on this soil information sheet the words which were different from the words on the test boring records"; that "wherever the word loam appeared originally * * * I erased that and substituted some other word"; that wherever the word loam appeared on the sheet prepared by Powers he erased the word loam and substituted sandy clay; that the soil information blue print was made up after the said changes had been made; that while he knew the purpose of making up the information sheet he did not inform any of the bidders on the job of the changes. That the changes made were of a most important and material nature appears not only from the testimony of certain of plaintiff's witnesses but also from the testimony of Trinkaus, defendant's chief engineer (called by plaintiff under Sec. 60 of the Practice Act). His testimony upon this point is so important that we deem it advisable to again call attention to his statements that there is a distinction between loam and clay - that loam itself is light grained and homogenous; that it does not cohere or adhere like clay; that it lacks cohesive quality; that clay has elasticity and you are able to mass it. The evidence shows that under the soil conditions stated in the soil information blue print plaintiff could conduct the work under what is known as the free air method, and that under

test boring records which showed that the soil in the area within which the tunnel was to be constructed between 25th and 32d streets on West Avenue, New York, consisted of medium loam, fine loam and loam. Towne, defendant's engineer, testified that the boring information compiled by Towne was transferred to defendant's Exhibit 5, the original tracing of the soil information sheet, exactly as it was recorded in the boring records; that he afterwards made changes in Exhibit 5, after the original tracing had been "submitted to Mr. Wittiges" [defendant's engineer of Newer Design] for his approval; that "at the direction of Mr. Wittiges" he "substituted on this soil information sheet the words which were different from the words on the test boring records"; that "however the word loam appeared originally * * * I erased that and substituted some other word"; that "however the word loam appeared on the sheet prepared by Towne he erased the word loam and substituted sandy clay; that the soil information fine print was made up after the said changes had been made; that while he knew the purpose of making up the information sheet he did not inform any of the witnesses on the job of the changes. That the changes made were of a most important and material nature appears not only from the testimony of certain of plaintiff's witnesses but also from the testimony of Towne, defendant's chief engineer (called by plaintiff under sec. 63 of the Practice Act). His testimony upon this point is so important that we deem it advisable to again call attention to his statements that there is a distinction between loam and clay - that loam itself is light colored and homogeneous; that it does not cohere or adhere like clay; that it lacks cohesive quality; that clay has elasticity and you are able to mass it. The evidence shows that under the soil conditions stated in the soil information fine print plaintiff could construct the work under what is known as the free air method, and that under

the soil conditions shown by the test boring records it would be necessary to use compressed air in certain parts of the work. When plaintiff submitted its bid to defendant, and its plan of operation, which was based upon the theory that plaintiff could do the work by the free air method, defendant's engineers must have known that plaintiff was deceived by the false information contained in the soil information blue print, yet, defendant accepted the bid, approved plaintiff's plan of operation, and allowed plaintiff to proceed with the work, although defendant's engineers must have anticipated the result that followed. The jury were fully warranted in finding that defendant, after it knew that plaintiff was deceived by the statements in the soil information blue print, persisted in the deception. If the changes made were not important, as defendant now contends, why were they made? And why was the information contained in defendant's test boring records concealed from plaintiff? Defendant calls attention to the following legend, that appears upon the soil information blue print: "This Information Is Believed To Be Accurate But The Sanitary District Of Chicago Does Not Guarantee It." Defendant argues that this language proves conclusively that the information contained in the soil information blue print was not statements of fact. However, the statement that "This Information Is Believed To Be Accurate" was false, and the jury were fully justified in finding from the evidence and the particular circumstances of the case that the words as to the nature of the soil were statements of fact that were intended to deceive plaintiff, and did deceive plaintiff, to its great damage. We are entirely unable to agree with the "belief of the trial judge" that there was no intention on the part of defendant to defraud plaintiff.

the soil conditions shown by the test boring records it would be necessary to use compressed air in certain parts of the work. When plaintiff submitted its bid to defendant, and its plan of operation, which was based upon the theory that plaintiff could do the work by the free air method, defendant's engineers must have known that plaintiff was deceived by the false information contained in the soil information blue print, yet, defendant accepted the bid, approved plaintiff's plan of operation, and allowed plaintiff to proceed with the work, although defendant's engineers must have anticipated the result that followed. The jury were fully warranted in finding that defendant, after it knew that plaintiff was deceived by the statements in the soil information blue print, retained in the deception. If the changes made were not important, as defendant now contends, why were they made? And why was the information contained in defendant's test boring records concealed from plaintiff? Defendant calls attention to the following legend, that appears upon the soil information blue print: "This information is believed to be accurate but the Sanitary District of Chicago Does Not Guarantee It." Defendant argues that this language proves conclusively that the information contained in the soil information blue print was not statements of fact. However, the statement that "This information is believed to be accurate" was false, and the jury were fully justified in finding from the evidence and the particular circumstances of the case that the words as to the nature of the soil were statements of fact that were intended to deceive plaintiff, and did deceive plaintiff, to its great damage. We are entirely unable to agree with the "belief" of the trial judge that there was no intention on the part of defendant to deceive plaintiff.

Defendant contends that plaintiff had no right to rely upon the alleged misrepresentation (soil information blue print) because of the provisions in the proposal and contract which made it obligatory upon plaintiff to make its own examinations and investigations; that the soil information blue print bore the legend: "This Information Is Believed To Be Accurate But The Sanitary District Of Chicago Does Not Guarantee It." It is sufficient to state in answer to this contention that the jury found that defendant was guilty of actual fraud and deceit, and, therefore, defendant cannot escape the consequences of such conduct by relying upon exonerating provisions in the contract and in the soil information blue print. What we have just stated also applies to the further contention of defendant that plaintiff could have discovered the alleged fraud and misrepresentations if it had exercised reasonable diligence.

Defendant contends that "there was no evidence offered or received fairly and legally tending to prove an action at law in assumpsit for expense incurred by plaintiff at 13th street and East avenue." In view of the record it is surprising that defendant should raise this contention. This is an appeal by plaintiff from an order allowing defendant's motion for judgment notwithstanding the verdict in favor of plaintiff, and defendant does not explain how this contention, even if there were merit in it, would justify the said judgment. However, the contention is entirely devoid of merit. During the hearing of the testimony the following stipulation was entered into by the parties:

"It is stipulated and agreed by the parties hereto that the summation of the testimony heretofore given by Mr. Love as a witness in this case that if he were recalled to the witness stand as a witness he would testify that from the books and records of the McKay Engineering and Construction Company that

Defendant contends that plaintiff had no right to rely upon the alleged misrepresentation (and information blue print) because of the provisions in the proposal and contract which made it obligatory upon plaintiff to make its own examinations and investigations; that the said information blue print bore the legend: "This Information is Believed to be Correct by the Sanitary District of Chicago for Reference It." It is sufficient to state in answer to this contention that the jury found that defendant was guilty of actual fraud and deceit, and, therefore, defendant cannot escape the consequences of such conduct by relying upon exonerating provisions in the contract and in the said information blue print. What we have just stated also applies to the further contention of defendant that plaintiff could have discovered the alleged fraud and misrepresentation if it had exercised reasonable diligence.

Defendant contends that "there was no evidence offered or received fairly and legally tending to prove an action at law in assumption for expense incurred by plaintiff at 1324 street and East Avenue." In view of the record it is surprising that defendant should raise this contention. This is an appeal by plaintiff from an order allowing defendant's motion for judgment notwithstanding the verdict in favor of plaintiff, and defendant does not explain how this contention, even if there were merit in it, would justify the said judgment. However, the contention is entirely devoid of merit. During the hearing of the testimony the following stipulation was entered into by the parties:

"It is stipulated and agreed by the parties hereto that the substance of the testimony heretofore given by Mr. Love as a witness in this case that all he was recalled to the witness stand as a witness he would testify that from the books and records of the McKay Engineering and Construction Company that

the total additional expense incurred by reason of the suspension of the work and the completion of the section of the twelve-foot sewer under compressed air at or near 24th Street and East Avenue would be the sum of \$221,015.75; and that he would testify that said sum is the fair and reasonable cost for performing the work from the period of suspension at or near 24th Street and East Avenue to the completion of the sewer thereof.

"It is further stipulated and agreed that Mr. Love would testify that from the books and records of the McKay Engineering and Construction Company that the additional cost during the period of suspension at 13th Street and East Avenue would be the sum of \$21,076.01; and further, that he would testify that said sum is the fair and reasonable cost for said work and that the total of said two sums is \$242,091.76."

The court thereupon addressed the jury as follows:

"Ladies and Gentlemen of the Jury: The reporter is about to read a stipulation. The lawyers have agreed between themselves that if Mr. Love, a witness whom you have heard before, were to be put back on the stand, he would testify to certain things. They are going to read what he would testify to if he were called back. The purpose is just to save time. Instead of putting a lot of questions and having a lot of answers, they agree he would testify to certain things. The Defendant does not admit that these things are true, but admits that he would testify to them if we called him. Will you read the stipulation, please?"

At the conclusion of the evidence, during a colloquy between the court and counsel as to instructions, the following occurred: "The Court: That the jury find the issues for the plaintiff, and assess plaintiff's damages in the sum of, -- whatever that amount is, or, 'we find the issues for the

the total additional expense incurred by reason of the suspension of the work and the completion of the section of the twelve-foot sewer under compressed air at or near 24th Street and East Avenue would be the sum of \$221,012.75; and that he would testify that said sum is the fair and reasonable cost for performing the work from the period of suspension at or near 24th Street and East Avenue to the completion of the sewer thereof.

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The court thereupon addressed the jury as follows:

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At the conclusion of the evidence, during a colloquy between the court and counsel as to instructions, the following occurred: "The Court: That the jury find the issues for the plaintiff, and assess plaintiff's damages in the sum of, -- whatever that amount is, or, we find the issues for the

defendant.' If you would both agree, I could supplement that instruction by stating 'You will have no discretion to find any other amount. If you find one way, it will have to be just one way.' Mr. Kealy [attorney for plaintiff]: I think it would be good to give that, to have them be given this amount in writing. The Court: I think the amount should appear, - that 'The jury find the issues for the plaintiff and assess plaintiff's damages in the sum of \$241,000.00.' Some additional instruction is necessary to say that 'this is the type of case where the jury must either return a verdict for the entire amount, or for nothing. You have no right to return any other amount,' or something of that kind. If I were the defendant, I would like some instruction like that, although I will not insist upon it to either of you. Mr. Kealy: I think, in view of the evidence, that is the only thing that can be done. The Court: The point is, whether or not that form of verdict needs any clarification. Mr. Kealy: I think you should tell the jury that, because of the nature of the case, there being only one figure, the jury would have to decide either that the plaintiff was entitled to that figure, or nothing. Mr. Fenlon [attorney for defendant]: It is all right with me." Thereupon the court, in his instructions to the jury, gave them the following instruction: "The Court instructs the jury that if you find for the Plaintiff, McKay Engineering and Construction Company, then you shall fix the Plaintiff's damages at the sum of \$242,091.76."

There is no merit in defendant's contention that "plaintiff's alleged cause of action based on fraud and deceit is barred by the 5 year statute of limitations." The instant suit was commenced in January, 1944. Defendant included in its answer a plea that plaintiff's cause of action was barred

Defendant. If you would both agree, I could supplement that instruction by stating 'You will have no discretion to find any other amount. If you find one way, it will have to be just one way.' Mr. Kealy [attorney for plaintiff]: I think it would be good to give that, to have them be given this amount in writing. The Court: I think the amount should appear, - that 'The jury find the issues for the plaintiff and assess plaintiff's damages in the sum of \$241,000.00.' Some additional instruction is necessary to say that 'this is the type of case where the jury must either return a verdict for the entire amount, or for nothing. You have no right to return any other amount, or something of that kind. If I were the defendant, I would like some instruction like that, although I will not insist upon it to either of you. Mr. Kealy: I think, in view of the evidence, that is the only thing that can be done. The Court: The point is, whether or not that form of verdict needs any clarification. Mr. Kealy: I think you should tell the jury that, because of the nature of the case, there being only one figure, the jury would have to decide either that the plaintiff was entitled to that figure, or nothing. Mr. Tension [attorney for defendant]: It is all right with me. Thereupon the court, in his instructions to the jury, gave them the following instruction: "The Court instructs the jury that if you find for the Plaintiff, Kealy Engineering and Construction Company, then you shall fix the Plaintiff's damages at the sum of \$242,091.76."

There is no merit in defendant's contention that "plaintiff's alleged cause of action based on fraud and deceit is barred by the 5 year statute of limitations." The instant suit was commenced in January, 1944. Defendant included in its answer a plea that plaintiff's cause of action was barred

by the five-year Statute of Limitations. Plaintiff filed a verified reply to the plea, in which it stated: "In the alternative plaintiff says that if the action is construed in whole or in part as being based upon an implied contract then said cause of action accrued upon the discovery by plaintiff in December, 1943, of certain boring records and reports made and prepared by defendant's engineer, one William J. Powers, prior to December, 1935, and which said boring records and reports have ever since been in the custody and control and possession of defendant and were by said defendant concealed and withheld from plaintiff until plaintiff's discovery in December, 1943 as aforesaid." Defendant filed no answer to plaintiff's reply. The said allegations in plaintiff's reply were therefore admitted. (See par. 164, sec. 40 (2) of the Civil Practice Act.) Ch. 83, par. 23, sec. 22, Ill. Rev. Stat. 1947, provides:

"23. Fraudulent concealment.] Sec. 22. If a person liable to an action fraudulently conceals the cause of such action from the knowledge of the person entitled thereto, the action may be commenced at any time within five years after the person entitled to bring the same discovers that he has such cause of action, and not afterwards."

Defendant contends that "plaintiff's claims were not filed within the time or in the form prescribed by the contract of the parties which were agreed conditions precedent to recovery." This contention ignores the fact that this is an action for fraud and deceit, and the further fact that defendant withheld and concealed from plaintiff essential evidence, upon which plaintiff's claim is based. The "form" prescribed by the contract was not intended to apply to a claim like the instant one. In view of the fact that defendant agreed that the court should instruct the jury that if plaintiff was entitled to recover the jury

by the five-year Statute of Limitations. Plaintiff filed a verified reply to the plea, in which it stated: "In the alternative plaintiff says that if the action is construed in whole or in part as being based upon an implied contract then said cause of action accrued upon the discovery by plaintiff in December, 1943, of certain boring records and reports made and prepared by defendant's engineer, one William J. Powers, prior to December, 1937, and which said boring records and reports have ever since been in the custody and control and possession of defendant and were by said defendant concealed and withheld from plaintiff until plaintiff's discovery in December, 1943 as aforesaid." Defendant filed no answer to plaintiff's reply. The said allegations in plaintiff's reply were therefore admitted. (See par. 164, sec. 46 (2) of the Civil Practice Act.) Ch. 83, par. 23, sec. 22, Ill. Rev. Stat. 1947, provides: "23. Fraudulent concealment. [Sec. 22. If a person liable to an action fraudulently conceals the cause of such action from the knowledge of the person entitled thereto, the action may be commenced at any time within five years after the person entitled to bring the same discovers that he has such cause of action, and not afterwards."

Defendant contends that "plaintiff's claims were not filed within the time or in the form prescribed by the contract of the parties which were agreed conditions precedent to recovery." This contention ignores the fact that this is an action for fraud and deceit, and the further fact that defendant withheld and concealed from plaintiff essential evidence, upon which plaintiff's claim is based. The "form" prescribed by the contract was not intended to apply to a claim like the instant one. In view of the fact that defendant agreed that the court should instruct the jury that if plaintiff was entitled to recover the jury

should fix plaintiff's damages at \$242,091.76, does it now seriously contend that the judgment non obstante veredicto can be sustained upon the ground urged in the instant contention?

Defendant next contends that "the measure of damages, in the event of liability, for delay is as prescribed and limited by the contract of the parties." What we have heretofore stated as to the agreement made by defendant as to the amount of the damages plaintiff was entitled to, should the jury find for plaintiff, sufficiently answers the instant contention.

Plaintiff contends that as defendant did not file a motion for a new trial it waived the right to file such motion and that therefore the instant judgment of the Superior court of Cook county should be reversed and the cause should be remanded with directions to the trial court to enter judgment for plaintiff for \$242,091.76, the amount of the verdict, the judgment for \$2,556.90 heretofore entered in the cause to stand. Defendant states that the following order refutes plaintiff's statement that it did not file a motion for a new trial. On November 25, 1946, the following order was entered by the minute clerk of the court:

"On this day again come the parties hereto and by their Attorneys respectively the jury heretofore impanelled herein for the trial of said cause also come and after hearing all of the evidence adduced say 'WE THE JURY FIND THE ISSUES FOR THE PLAINTIFF AND ASSESS THE PLAINTIFF'S DAMAGES AT THE SUM OF \$242,091.76' and the motion of the defendant for a new trial herein is set for hearing on December 13, 1946."

We are familiar with the practice that when a verdict is returned the minute clerk enters an order similar to the

should the plaintiff be allowed to recover the amount of \$242,091.76, does it now seriously contend that the judgment was obtained by fraud and is void and can be set aside upon the ground urged in the instant contention?

Defendant next contends that "the nature of damages, in the event of liability, for delay is as prescribed and limited by the contract of the parties." What we have heretofore stated as to the agreement made by defendant as to the amount of the damages plaintiff was entitled to, should the jury find for plaintiff, is substantially correct. The instant contention.

Plaintiff contends that as defendant did not file a motion for a new trial it waived the right to file such motion and that therefore the instant judgment of the superior court of Cook County should be reversed and the cause should be remanded with directions to the trial court to enter judgment for plaintiff for \$242,091.76, the amount of the verdict, the judgment for \$2,500.00 heretofore entered in the cause to stand. Defendant states that the following order was entered in plaintiff's statement that it did not file a motion for a new trial. On November 13, 1943, the following order was entered by the minute clerk of the court:

"On this day again come the parties hereto and by their attorneys respectively the jury heretofore impaneled herein for the trial of said cause also come and after hearing all of the evidence offered say that the jury find the verdict for the plaintiff and award the plaintiff damages of the sum of \$242,091.76 and the motion of the defendant for a new trial herein is set for hearing on December 13, 1943."

It is familiar with the practice that when a verdict is returned the minute clerk enters an order similar to the

foregoing one and that the order means only that if a motion for a new trial is filed the hearing of such motion is set for a day certain. The Practice Act requires that a party making a motion for a new trial "file the points in writing, particularly specifying the grounds of such motion." (Ch. 110, par. 192, sec. 68 (1), Ill. Rev. Stat. 1947.) It would be idle for defendant to contend that it filed a written motion for a new trial in accordance with the provisions of the Practice Act at the time that the verdict of the jury was returned. We have before us the certificate of the Clerk of the Superior court that the transcript of the record before us is "a true, perfect and complete transcript." It does not show that a motion for a new trial was ever filed by defendant in the cause. Counsel for plaintiff have challenged defendant to show by the records of the court that it filed a motion for a new trial, and if such a motion were actually filed the able and alert attorneys for defendant, understanding, of course, the importance of the matter, would undoubtedly have filed a supplementary record that would show such filing. We note that counsel for defendant do not specifically state in their brief that a motion for a new trial was actually filed in the cause. Rule 22 of the Supreme court of Illinois provides, inter alia, the following:

"When a motion for a judgment notwithstanding the verdict shall be filed and submitted in any court of record in any civil cause tried before a jury, and such court shall enter an order granting such motion for judgment notwithstanding the verdict, such court shall at the same time pass upon and decide in the same order any motion for a new trial made by the party moving for judgment notwithstanding the verdict * * * Any party who fails to file a motion for a new trial as herein provided

forgetting one and that the order means only that it is a motion for a new trial is filed the hearing of such motion is set for a day certain. The Practice Act requires that a party making a motion for a new trial "file the points in writing, particularly specifying the grounds of such motion." (Ill. Civ. Prac. Act, sec. 98 (1), Ill. Rev. Stat., 1947.) It would be idle for defendant to contend that it filed a written motion for a new trial in accordance with the provisions of the Practice Act at the time that the verdict of the jury was returned. We have before us the certificate of the Clerk of the Superior Court that the transcript of the record before us is "true, perfect and complete transcript." It does not show that a motion for a new trial was ever filed by defendant in the cause. Counsel for plaintiff have challenged defendant to show by the records of the court that it filed a motion for a new trial, and if such a motion were actually filed the this and alert attorneys for defendant, understanding, of course, the importance of the matter, would undoubtedly have filed a supplementary record that would show such filing. We note that counsel for defendant do not specifically state in their brief that a motion for a new trial was actually filed in the cause. Rule 22 of the Supreme Court of Illinois provides, inter alia, the following:

"When a motion for a judgment notwithstanding the verdict shall be filed and submitted in any court of record in any civil cause tried before a jury, and such court shall enter an order granting such motion for judgment notwithstanding the verdict, such court shall at the same time pass upon and decide in the same order any motion for a new trial made by the party moving for judgment notwithstanding the verdict."

who fails to file a motion for a new trial as herein provided

shall be deemed to have waived the right to apply for a new trial." (Italics ours.)

If defendant had filed a motion for a new trial it would be to its interest to have the trial court pass upon that motion when it passed upon the motion for judgment notwithstanding the verdict. The record shows that the trial court at the time it passed upon the motion for judgment notwithstanding the verdict did not pass upon any motion for a new trial, and it is plain from the record that defendant did not file a motion for a new trial.

The judgment of the Superior court of Cook county, except as to that part of the judgment wherein judgment was entered by agreement in favor of plaintiff in the amount of \$2,556.90, is reversed and the cause is remanded with directions that the trial court enter an additional judgment for plaintiff in the amount of \$242,091.76 upon the verdict of the jury.

JUDGMENT AFFIRMED IN PART, REVERSED
IN PART, AND REMANDED WITH DIRECTIONS.

Friend, P. J., and Sullivan, J., concur.

shall be deemed to have waived the right to file for a new

trial." (Exhibit one.)

It is further stated that a motion for a new trial at

would be to the interest of justice and the trial court has upon

that motion when it passed upon the motion for judgment

notwithstanding the verdict. The record shows that the

trial court at the time it passed upon the motion for judgment

notwithstanding the verdict did not pass upon the motion for a

new trial, and it is plain from the record that defendant did

not file a motion for a new trial.

The judgment of the Superior Court of Cook County,

except as to that part of the judgment wherein judgment was

entered by agreement in favor of plaintiff in the amount of

\$2,550.00, is reversed and the cause is remanded with direc-

tions that the trial court enter an additional judgment for

plaintiff in the amount of \$44,001.75 upon the verdict of

the jury.

JUDGMENT AFFIRMED IN PART, REVERSED
IN PART, AND REMANDED WITH DIRECTIONS.

Pyron, J., and Sullivan, J., concur.

44146

LOUIS E. WAGNER,

Appellee,

v.

JAMES BALL,

Appellant.

203
A
APPEAL FROM MUNICIPAL

COURT OF CHICAGO.

335 I.A. 225

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

Plaintiff filed an amended statement of claim against defendant, who filed an answer to the complaint and also filed an amended counterclaim against plaintiff. The case was tried by the court without a jury and there was a finding in favor of plaintiff in the sum of \$250, and also a finding against defendant upon his counterclaim. Defendant and counterclaimant, hereinafter called defendant, appeals from a judgment entered upon the findings. Plaintiff has not filed a brief in this court.

Plaintiff's amended statement of claim alleges: "1. That on or about June 8, 1946, the plaintiff at the special instance, request and solicitation of the defendant, paid, deposited and delivered to the defendant the sum of Five Hundred Dollars in connection with the proposed sale by the defendant and the contemplated purchase by the plaintiff of the real estate, then and there allegedly owned and possessed by the defendant, and commonly known and described as 5118 North Neenah Avenue, Chicago, Illinois. 2. That no written contract or memorandum relating thereto was prepared or executed by the plaintiff and defendant, contrary to the Statute in such case made and provided. 3. That the plaintiff often requested and demanded of the defendant the return of said sum of Five Hundred Dollars, but the defendant failed, neglected and refused and still refuses to do so, wherefore, plaintiff asks for judg-

APPEAL FROM MUNICIPAL
COURT OF CHICAGO

LOUIS E. WAGNER,
Appellee,
v.
JAMES SMITH,
Appellant.

MR. JUSTICE SCAMMAN DELIVERED THE OPINION OF THE COURT.

Plaintiff filed an amended statement of claim against defendant, who filed an answer to the complaint and also filed an amended counterclaim against plaintiff. The case was tried by the court without a jury and there was a finding in favor of plaintiff in the sum of \$250, and also a finding against defendant upon his counterclaim. Defendant and counterclaimant hereinafter called defendant, appeals from a judgment entered upon the findings. Plaintiff has not filed a brief in this court.

Plaintiff's amended statement of claim alleges: "1. That on or about June 8, 1946, the plaintiff at the special instance, request and solicitation of the defendant, paid, deposited and delivered to the defendant the sum of five hundred dollars in connection with the proposed sale by the defendant and the contemplated purchase by the plaintiff of the real estate, then and there allegedly owned and possessed by the defendant, and commonly known and described as 7118 North Dearborn Avenue, Chicago, Illinois. 2. That no written contract or memorandum relating thereto was prepared or executed by the plaintiff and defendant, contrary to the statute in such case made and provided. 3. That the plaintiff often requested and demanded of the defendant the return of said sum of five hundred dollars, but the defendant failed, neglected and refused and still refuses to do so, wherefore, plaintiff asks for judg-

ment against the defendant for \$500.00, plus interest and costs." Defendant filed the following verified answer: "1. The defendant admits the allegations in paragraph one of amended statement of claim and further alleges that on the 8th day of June, 1946 he was the owner of the premises at 5118 N. Neenah Ave. and was able, ready and willing to furnish a merchantable title thereto. 2. The defendant denies the allegations in paragraph 2 of the plaintiff's amended statement of claim and further alleges that there was a contract and a sufficient memorandum to satisfy the Statute of Frauds and Perjuries * * *. 3. The defendant admits the allegations in paragraph 3 of the plaintiff's amended statement of claim and further alleges that the five hundred dollars was deposited as earnest money and was forfeited when the plaintiff breached his contract with the defendant by failing to purchase the property in question." Defendant filed an amended counterclaim which alleges in substance that on June 8, 1946, he was the owner of and was able, ready and willing to furnish a good and merchantable title to the premises in question; that on said date plaintiff came to the home of defendant and orally agreed to purchase the premises in question for the sum of \$13,500 and to sign a formal contract for the purchase as soon as it was drawn up; that plaintiff pursuant to said agreement deposited with defendant \$500 as earnest money to bind the contract and received from defendant the following memorandum:

"June 8, 1946

"Received of Mr. & Mrs. Louis E. Wagner five-hundred (\$500.00) dollars as deposit on purchase of my home at 5118 N. Neenah Ave.

"Signed, James Ball";

that on June 22, 1946, plaintiff notified defendant that he would be unable to enter into a formal contract or to fulfill

went against the defendant for \$500.00, plus interest and costs." Defendant filed the following verified answer: "1. The defendant admits the allegations in paragraph one of amended statement of claim and further alleges that on the 8th day of June, 1946 he was the owner of the premises at 5118 N. Hennepin Ave., and was able, ready and willing to furnish a merchantable title thereto. 2. The defendant denies the allegations in paragraph 2 of the plaintiff's amended statement of claim and further alleges that there was a contract and sufficient memorandum to satisfy the statute of Frauds and Paragraphs * * *. 3. The defendant admits the allegations in paragraph 3 of the plaintiff's amended statement of claim and further alleges that the five hundred dollars was deposited as earnest money and was forfeited when the plaintiff breached his contract with the defendant by failing to purchase the property in question." Defendant filed an amended counterclaim which alleges in substance that on June 8, 1946, he was the owner of and was able, ready and willing to furnish a good and merchantable title to the premises in question; that on said date plaintiff came to the home of defendant and orally agreed to purchase the premises in question for the sum of \$13,500 and to sign a formal contract for the purchase as soon as it was drawn up; that plaintiff pursuant to said agreement deposited with defendant \$500 as earnest money to bind the contract and received from defendant the following memorandum:

"June 8, 1946

"Received of Mr. & Mrs. Louis H. Wagner five-hundred (\$500.00) dollars as deposit on purchase of my home at 5118 N. Hennepin Ave.,

"Signed, James Fall"

that on June 22, 1946, plaintiff notified defendant that he would be unable to enter into a formal contract or to fulfill

the terms of the said agreement because he was without funds and unable to dispose of his own home; that on June 24, 1946, defendant mailed a letter addressed to plaintiff notifying him that the formal contract of sale had been ready for his signature since June 12, 1946, and that if he failed to consummate the sale within fifteen days defendant would consider the contract breached and would make other arrangements to sell the said property; that no reply was received to said letter; that defendant because of the said breach by plaintiff was forced to pay a commission of \$550 to dispose of his said real estate and also to pay a bill of \$15.30 for readvertising the said property; that on July 6 plaintiff again notified defendant that he was unable and unwilling to perform the terms of the said agreement, and defendant prays for a judgment for \$568.30 for damages sustained by reason of plaintiff's breach of contract. Plaintiff's answer to the amended counterclaim denies that he agreed to purchase the premises for \$13,500 and alleges that the agreed price was \$12,000.

Defendant contends that the court erred in refusing to rule upon the issues involving the Statute of Frauds and that the court should have ruled that the receipt in question was sufficient to meet the requirements of the Statute of Frauds. While we do not deem it necessary in deciding this appeal to pass upon this contention, still, in view of the fact that this case is to be tried again, we may state that the receipt does not meet the requirements of the statute. In Lipkin v. Koren, 392 Ill. 400, cited by defendant, the court states (pp. 406, 407): "The law is well settled in this State that in order to ascertain what sort of writing is sufficient to meet the requirements of section 2 of the Statute of Frauds no form of language is necessary if only the intention can be gathered, and that any kind of writing, from a solemn deed down to mere hasty notes

kind of writing, from a solemn deed down to mere hasty notes
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407): "The law is well settled in this State that in order to
392 Ill. 400, cited by defendant, the court states (pp. 400,
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rule upon the issues involving the Statute of Wills and that
Defendant contends that the court erred in refusing to
for \$15,000 and alleges that the agreed price was \$12,000.
amended complaint denies that he agreed to purchase the premises
of plaintiff's breach of contract. Plaintiff's answer to the
prays for a judgment for \$208.50 for damages sustained by reason
willing to perform the terms of the said agreement, and defendant
plaintiff again notified defendant that he was unable and un-
of \$15.30 for repossessing the said property; that on July 6
\$250 to dispose of his said real estate and also to pay a bill
the said breach by plaintiff was forced to pay a commission of
no reply was received to said letter; that defendant because of
and would make other arrangements to sell the said property; that
within fifteen days defendant would consider the contract breached
since June 12, 1946, and that if he failed to consummate the sale
that the formal contract of sale had been ready for his signature
defendant mailed a letter refusing to plaintiff notifying him
and unable to dispose of his own home; that on June 24, 1946,
the terms of the said agreement because he was without funds

or memoranda in books, papers or letters, will suffice. The writing, notes or memoranda must contain on their face, or by reference to others, the names of the parties, vendor and vendee, a sufficiently clear and explicit description of the property to render it capable of being identified, together with the terms, conditions, if any, and price to be paid or other consideration to be given." (Italics ours.) It will be noted that the receipt in the instant case contains no mention of the price to be paid nor the terms and conditions. In Ullsperger v. Meyer, 217 Ill. 262, 264, also cited by defendant, the receipt stated, "at the price of \$14,000." In the instant case the parties differ as to the agreed price.

The material contention of defendant is that the finding of the trial court for plaintiff in the sum of \$250 was an arbitrary decision, not sustained by the law or any evidence in the case. This contention is clearly a meritorious one. Plaintiff claimed that defendant breached the oral agreement made by the parties. Defendant claimed that whether the contract be considered as a written or an oral one, plaintiff breached it. If the trial court believed the testimony of plaintiff, then he was entitled to recover the entire deposit. If the court believed defendant's testimony then defendant was entitled to keep the entire deposit. But here the court seems to have concluded that if he divided the amount of the deposit between the parties both would be satisfied. We cannot approve this method of deciding a law suit. Plaintiff and his wife testified for plaintiff; defendant and his wife testified for defendant. A just decision in this case turns upon the credibility of the witnesses and the weight that should be attached to their testimony. In our judgment, a trial court can best determine wherein the truth lies in this case.

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The material contention of defendant is that the finding of the trial court for plaintiff in the sum of \$250 was an arbitrary decision, not sustained by the law or any evidence in the case. This contention is clearly a meritless one. Plaintiff claimed that defendant breached the oral agreement made by the parties. Defendant claimed that whether the contract be considered as a written or an oral one, plaintiff breached it. If the trial court believed the testimony of plaintiff, then he was entitled to recover the entire deposit. If the court believed defendant's testimony then defendant was entitled to keep the entire deposit. But here the court seems to have concluded that it be divided the amount of the deposit between the parties both would be satisfied. We cannot approve this method of deciding a law suit. Plaintiff and his wife testified for plaintiff; defendant and his wife testified for defendant. A just decision in this case turns upon the credibility of the witnesses and the weight that should be attached to their testimony. In our judgment, a trial court can best determine wherein the truth lies in this case.

-5-

The judgment order of the Municipal court of Chicago entered March 11, 1947, is reversed in toto and the cause is remanded for a new trial.

JUDGMENT ORDER ENTERED MARCH
11, 1947, REVERSED IN TOTO
AND CAUSE REMANDED FOR A NEW
TRIAL.

Friend, P. J., and Sullivan, J., concur.

The judgment order of the Municipal Court of Chicago entered March 11, 1947, is reversed in toto and the case is remanded for a new trial.

THE COURT ORDERED THAT THE JUDGMENT BE REVERSED IN TOTO AND THE CASE REMANDED FOR A NEW TRIAL.

THOMAS, F. J., and WILLIAMS, J., CONCUR.

IN ONE
the fourth

44422

WILLIAM KNAPP AND CO.,
a corporation,

Appellee,

v.

J. J. JOHNS,

Appellant.

206
A
APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

335 I.A. 226'

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

An action in forcible detainer brought by plaintiff to obtain possession of the 3d floor of the premises at 5524 Indiana avenue, Chicago. The trial court found that defendant was guilty of unlawfully withholding from plaintiff the possession of the premises, that the right to the possession of the same was in plaintiff, "and that the plaintiff have and recover of and from the defendant, J. J. Johns, possession of the premises described in the complaint herein, and that a writ of restitution issue therefor." Defendant appeals.

Both parties assume that defendant was a tenant from month to month. Chap. 80, par. 6, sec. 6, Ill. Rev. Stat. 1947, provides:

"6. Notice to terminate tenancy for any term less than one year.] Sec. 6. In all cases of tenancy for any term less than one year, where the tenant holds over without special agreement, the landlord may terminate the tenancy by thirty days' notice, in writing, and may maintain an action for forcible entry and detainer or ejectment."

In order to prove termination of tenancy plaintiff introduced in evidence a notice, the relevant part of which reads as follows:

"3 Apt.

"Notice of Termination of Tenancy

"TO J. J. JOHNS

"5524 Indiana Avenue, Chicago, Illinois

WILLIAM KERRY AND CO.,
a corporation,
Appellee,
v.
J. J. JOHNS,
Appellant.

THE JUSTICE AGAINST THE OPINION OF THE COURT.

An action in forcible detainer brought by plaintiff to obtain possession of the premises at 524 Indiana Avenue, Chicago. The trial court found that defendant was entitled to possession of the premises, that the right to the possession of the same was in plaintiff, and that the plaintiff have and recover of and from the defendant, J. J. Johns, possession of the premises described in the complaint hereto, and that a writ of restitution issue therefor. The court's decision is reversed.

Both parties assume that defendant was a tenant from

month to month. Chap. 92, sec. 6, Ill. Rev. Stat.

1947, provides:

"6. Notice to terminate tenancy for any term less than

one year. Sec. 6. In all cases of tenancy for any term less

than one year, where the tenant holds over without special

agreement, the landlord may terminate the tenancy by giving

days' notice, in writing, and may maintain an action for forcible

entry and detainer or ejectment."

In order to prove termination of tenancy plaintiff intro-

duced in evidence a notice, the relevant part of which reads as

follows:

"3 Apt.

"Notice of Termination of Tenancy

"To J. J. JOHNS

"YOU ARE HEREBY NOTIFIED, That your tenancy of the following premises, to-wit: 3rd floor apartment of the premises known as 5524 Indiana Avenue, Chicago, Illinois: * * * situate in the City of Chicago, in the County of Cook, and State of Illinois, will terminate on the 30th day of November A.D. 1947, and you are now hereby required to surrender possession of said premises to the undersigned on that day.

"Dated at Chicago, Illinois, this 1- day of Nov. A. D. 1947

"William Knapp & Co., A Corporation

"By [s] William Knapp

"Its President and duly authorized agent"

Defendant contends, inter alia, that the above notice is not the thirty days' notice required by section 6 of the Landlord and Tenant Act; that it was in fact a twenty-nine days' notice which did not terminate the tenancy and, therefore, plaintiff had no right to maintain its present action. This contention is clearly a meritorious one. Indeed, plaintiff does not claim that the notice in question complied with section 6, but it claims that defendant's contention cannot be raised in this court for the reason that the point was not brought to the attention of the trial court. "* * * the action of forcible entry and detainer, or forcible detainer, is a special statutory proceeding, summary in its nature and in derogation of the common law, and it follows that the conditions and requirements that the statute prescribes in conferring jurisdiction must clearly exist and that the mode of procedure provided by it must be strictly pursued." (Fitzgerald v. Quinn, 165 Ill. 354, 360, and cases cited therein.) It is also settled law that a demand in writing is an essential prerequisite before bringing an action of forcible detainer. (See Benjamin v. Allison, 201 Ill. App.

"YOU ARE HEREBY NOTICED, that your tenancy of the following premises, to-wit: The first apartment of the premises known as 324 Indiana Avenue, Chicago, Illinois: * * * situate in the City of Chicago, in the County of Cook, and State of Illinois, will terminate on the 30th day of November A.D. 1947, and you are now hereby required to surrender possession of said premises to the undersigned on that day."

Dated at Chicago, Illinois, this 1st day of Nov. A.D. 1947

"William Knapp & Co., A Corporation
By [s] William Knapp
The President and duly authorized agent"

Defendant contends, inter alia, that the above notice is not the thirty days' notice required by section 3 of the Landlord and Tenant Act; that it was in fact a twenty-nine days' notice which did not terminate on the twenty-ninth day, therefore, plaintiff had no right to maintain its present action. This contention is clearly a meritless one. Indeed, plaintiff does not claim that the notice in question complied with section 3, but it claims that defendant's contention cannot be raised in this court for the reason that the point was not brought to the attention of the trial court. " * * * the action of the trial court and defendant, or forcible detainer, is a special statutory proceeding, summary in its nature and in violation of the common law, and it follows that the objections and requirements that the state presented in conducting jurisdiction must clearly exist and that the mode of procedure provided by it must be strictly observed." (*Windsor v. Windsor*, 135 Ill. 374, 380, and cases cited therein.) It is also settled law that a demand in writing is an essential prerequisite before bringing an action of forcible detainer. (See *Windsor v. Windsor*, 135 Ill. 374.

34, 36, 37, and Kramer v. Hessler, 291 Ill. App. 131, 134.) In plaintiff's notice of November 1, 1947, its demand that defendant surrender possession of the premises on November 30 was based upon the unwarranted assumption that the month to month tenancy was terminated on that date. As plaintiff could not maintain an action of forcible detainer under section 6 for the reason that defendant's tenancy had not been terminated "by thirty days' notice, in writing," it follows that defendant's contention that the trial court lacked jurisdiction of the subject matter of the cause is a meritorious one. That contention can be raised for the first time in this court or in the Supreme court. The judgment of the Municipal Court of Chicago must therefore be reversed.

The judgment of the Municipal Court of Chicago is reversed.

JUDGMENT REVERSED.

Friend, P. J., and Sullivan, J., concur.

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... 1907, the ...
... possession of the ...
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... "by thirty days' notice, in writing," is ...
... and a contention that the ...
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... contention can be ...
... on in the ...
... of Chicago was ...
... The judgment of the ...
... reversed.

JUDGMENT REVERSED.

... 3, 4, and 5, ...

44169

JOSEPH CACIC,

Appellee,

v.

STEVE MILETICH,

Appellant.

Joe *A*
APPEAL FROM SUPERIOR COURT,
COOK COUNTY.

335 I.A. 226²

MR. JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT.

This action was brought by plaintiff, Joseph Cacic, to recover damages for injuries he claimed to have suffered as the result of an unprovoked assault and battery upon him by the defendant, Steve Miletich. The case was tried by the court and a jury. A verdict was returned finding the defendant guilty and assessing plaintiff's damages at \$2500. Defendant's motion for a new trial was overruled and judgment was entered against him on the verdict. Defendant appeals.

In 1944 defendant was the proprietor of a tavern at 10163 Avenue N in Chicago. Plaintiff, who was blind in his right eye and only had 25% vision in his left eye, worked as a porter in the tavern and lived on the premises. The condition of plaintiff's eyesight was due to an injury he received in the course of his employment by a contractor in 1939. Because of such injury he had been receiving \$40 a month compensation since that time.

On July 24, 1944 defendant went to a picnic. About 4 P.M. that day plaintiff entered the tavern and remained there until about midnight. About 7 P.M. Dorothy Green and three other young ladies went into the tavern. Sometime thereafter the lady bartender on duty requested Dorothy Green to assist her in tending bar.

Defendant was intoxicated when he returned to the tavern from the picnic about 9 P.M. with a party of musicians. When he entered the tavern and saw Dorothy Green tending bar, he called

44109

JOSEPH CASE, JR.

Appellee,

v.

JOHN KILPATRICK

Appellant.

APPEAL FROM SUPERIOR COURT,

GOOD COUNTY.

38214.286

THE JURY VERDICT WAS AFFIRMED BY THE COURT.

This action was brought by plaintiff, Joseph Case, Jr., to recover damages for injuries he claimed to have sustained as the result of an approved assault and battery upon him by the defendant, John Kilpatrick. The case was tried by the court and a jury. A verdict was returned finding the defendant guilty and assessing plaintiff's damages at \$10,000. Plaintiff's motion for a new trial was overruled and judgment was entered against him on the verdict. Defendant appeals.

In 1944 defendant was the proprietor of a tavern at 1016 1/2 Avenue B in Chicago. Plaintiff, who was blind in his right eye and only had 25% vision in his left eye, worked as a porter in the tavern and lived on the premises. The condition of plaintiff's eyesight was due to an injury he received in the course of his employment by a contractor in 1939. Because of such injury he had been receiving \$10 a month compensation since that time.

In July 24, 1944 defendant went to a picnic. About 4 P.M. that day plaintiff entered the tavern and remained there until about midnight. About 7 P.M. Dorothy Green and three other young ladies went into the tavern. Sometime thereafter the lady bartender on duty requested Dorothy Green to assist her in tending bar.

Defendant was intoxicated when he returned to the tavern from the picnic about 9 P.M. with a party of men. When he entered the tavern and saw Dorothy Green tending bar, he called

her vile and indecent names and ordered her from behind the bar. Observing that he was drunk, she said nothing to him but immediately stepped out from behind the bar. The musicians remained in the tavern until about 11 P.M. and while they were there, defendant drank five "shots" of whiskey. After the musicians left, plaintiff and defendant sat in the rear of the tavern. Dorothy Green then asked defendant why he called her indecent and vile names before all the people in the tavern. He thereupon slapped her face, cursed her and called her more indecent and foul names.

Plaintiff testified that at that time he said to defendant, "Steve, if you don't like girl in the place * * * you tell her * * * don't call her names"; that defendant then proceeded to call him the vilest kind of names and said, "Get out of my place"; that he said, "Thanks Steve," and went to his room and got his overalls and keys; that he put the keys on the bar and said to defendant, "Everything is square * * * just owe me two days work yet"; that defendant then came out from behind the bar and said, "Here * * * I go to pay you now," calling him another vile name; that defendant thereupon struck him in the face with his open hand, breaking his eyeglasses, which fell to the floor; that he backed up about three steps and the defendant "came after" him; that "I knock him down * * * he go after me again * * * I knock him down again * * * so I go back towards the screen door and he grabbed a stool * * * as soon as I turned around he hit me with the stool"; that it was "a pretty heavy wooden stool" and it struck him in the back; that defendant then went behind the bar and got a baseball bat and continued to run after him; that he was dizzy and could not see at that time but managed to open the screen door and got out to the sidewalk, where he fell twice; that he was not struck with the baseball bat; and that two girls assisted him

her vile and indecent names and ordered her from behind the bar. Observing that he was drunk, she said nothing to him but immediately stepped out from behind the bar. The musicians remained in the tavern until about 11 P.M. and while they were there, defendant drank five "shots" of whiskey. After the musicians left, defendant and defendant went in the rear of the tavern. Dorothy then went along behind the bar and called her indecent and vile names before all the people in the tavern. He thereupon slapped her face, cursed her and called her vile indecent and foul names.

Defendant testified that at that time he said to defendant, "Steve, if you don't like girl in the place * * * you tell her * * * don't call her names"; that defendant then proceeded to call him the vilest kind of names and said, "Get out of my place"; that he said, "Thomas Steve," and went to his room and got his overalls and keys; that he put the keys on the bar and said to defendant, "Everything is square * * * just owe me two days work yet"; that defendant then came out from behind the bar and said, "Come * * * I go to pay you now," calling him another vile name; that defendant thereupon struck him in the face with his open hand, breaking his eyeglasses, which fell to the floor; that he backed up about three steps and the defendant "came after" him; that "I knock him down * * * he go after me again * * * I knock him down again * * * so I go back towards the screen door and he grabbed a stool * * * as soon as I turned around he hit me with the stool"; that it was "a pretty heavy wooden stool" and it struck him in the back; that defendant then went behind the bar and got a baseball bat and continued to run after him; that he was dizzy and could not see at that time but managed to open the screen door and got out to the sidewalk, where he fell twice; that he was not struck with the baseball bat; and that two girls assisted him

to the police station. Plaintiff also testified that defendant told him that he owned two taverns and had \$15,000 in cash.

Miletich did not deny cursing plaintiff and calling him vile names and admitted striking the first blow. He denied striking plaintiff with the stool and running after him with a baseball bat.

The propriety of the verdict is not seriously questioned in so far as defendant's guilt is concerned but he contends that "there were no physical injuries proven and the only question as to damages is the amount that might be allowable for punitive damages" and that "the size of the verdict being out of all proportion to the injury indicates passion and prejudice of the jury."

The only evidence bearing on plaintiff's physical injuries, which the trial judge permitted the jury to consider, was that he was slapped in the face and hit in the back with a heavy bar stool by defendant and that he became dizzy and could not see after the bar stool struck him. The jury had the right to infer that plaintiff endured some physical pain and suffering as the result of being so slapped and struck.

While it is true that plaintiff testified, "I feel bad yet * * * I can't hear on this side here, right ear * * * my eye condition get worse, especially when weather change or some noise around me" and that he attempted to show that he incurred a doctor bill of \$100 and a hospital bill of \$22.50 in being treated for his eyes after he had been assaulted by defendant, the trial court properly held that this evidence was incompetent, because plaintiff failed to prove that there was any causal connection between the occurrence in question and the foregoing ailments concerning which he testified. Plaintiff presented no medical testimony and he stated at the trial that

to the police station. Plaintiff also testified that defendant told him that he owned two barbers and had \$15,000 in cash. Plaintiff did not deny owning Plaintiff's bar and selling him wife names and admitted striking the first blow. He denied striking plaintiff with the stool and running after him with a baseball bat.

The propriety of the verdict is not seriously questioned in so far as defendant's guilt is concerned but he contends that "there were no physical injuries proven and the only question as to damages is the amount that might be allowable for punitive damages" and that "the size of the verdict being out of all proportion to the injury inflicted passion and prejudice of the jury."

The only evidence bearing on plaintiff's physical injuries, which the trial judge permitted the jury to consider, was that he was struck in the face and hit in the back with a heavy bar stool by defendant and that he became dizzy and could not see after the bar stool struck him. The jury had the right to infer that plaintiff endured some physical pain and suffering as the result of being so struck and injured.

While it is true that plaintiff testified, "I feel bad yet I can't hear on this side here, right ear," my eye condition got worse, especially when weather changed or some noise struck me" and that he attempted to show that he incurred a doctor bill of \$150 and a hospital bill of \$25.00 in being treated for his eyes after he had been assaulted by defendant, the trial court properly held that this evidence was incompetent, because plaintiff failed to prove that there was any causal connection between the occurrence in question and the foregoing ailments concerning which he testified. Plaintiff presented no medical testimony and he stated at the trial that

his vision was the same then as it was prior to defendant's assault upon him, about two and one-half years before the trial.

Since the slap in the face and the blow in the back received by plaintiff were not shown by the evidence to have been attended by any serious consequences, it must be concluded that the \$2500 awarded him by the jury was almost entirely for punitive damages. There can be no question but that exemplary damages were properly allowable in this case but the amount thereof should bear some reasonable proportion to the actual damages sustained. Under all the facts and circumstances in evidence we think that the verdict was grossly excessive. A judgment for \$1250 would have amply compensated him for his actual damages as well as for the insult, indignity and mortification he suffered as the result of defendant's unprovoked assault upon him.

Therefore, if plaintiff will file a remittitur of \$1250 within 10 days, the judgment in his favor will be affirmed for \$1250; otherwise it will be reversed and the case remanded for a new trial.

Judgment affirmed for \$1250 on remittitur of \$1250 to be filed within 10 days by plaintiff; otherwise judgment to be reversed and the cause remanded.

AFFIRMED ON REMITTITUR OF \$1250 TO BE
FILED WITHIN TEN DAYS BY PLAINTIFF;
OTHERWISE JUDGMENT TO BE REVERSED
AND THE CAUSE REMANDED.

Fried, P. J., and Scanlan, J., concur.

THE NATIONAL ARCHIVES
COLLEGE PARK, MARYLAND

[illegible]

Thereafter, it is requested that this matter be referred to the Board of Directors for their consideration and action.

of 1951 to 1952, and 1953 to 1954, and 1955 to 1956, and 1957 to 1958, and 1959 to 1960, and 1961 to 1962, and 1963 to 1964, and 1965 to 1966, and 1967 to 1968, and 1969 to 1970, and 1971 to 1972, and 1973 to 1974, and 1975 to 1976, and 1977 to 1978, and 1979 to 1980, and 1981 to 1982, and 1983 to 1984, and 1985 to 1986, and 1987 to 1988, and 1989 to 1990, and 1991 to 1992, and 1993 to 1994, and 1995 to 1996, and 1997 to 1998, and 1999 to 2000, and 2001 to 2002, and 2003 to 2004, and 2005 to 2006, and 2007 to 2008, and 2009 to 2010, and 2011 to 2012, and 2013 to 2014, and 2015 to 2016, and 2017 to 2018, and 2019 to 2020, and 2021 to 2022, and 2023 to 2024, and 2025 to 2026, and 2027 to 2028, and 2029 to 2030, and 2031 to 2032, and 2033 to 2034, and 2035 to 2036, and 2037 to 2038, and 2039 to 2040, and 2041 to 2042, and 2043 to 2044, and 2045 to 2046, and 2047 to 2048, and 2049 to 2050, and 2051 to 2052, and 2053 to 2054, and 2055 to 2056, and 2057 to 2058, and 2059 to 2060, and 2061 to 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1914

44387

CITY OF EVANSTON,
Appellee,

v.

CHARTER WARD,
Appellant.

701
A
APPEAL FROM MUNICIPAL
COURT OF EVANSTON.

335 I.A. 227

MR. JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT.

Two complaints were filed in the Municipal Court of Evanston charging the defendant, Charter Ward, with violating two separate ordinances of the City of Evanston. The two cases were tried together by the same judge and jury. Verdicts were returned finding the defendant guilty and assessing a fine of five dollars against him on each charge. Judgments were entered on the verdicts and defendant appeals.

The ordinances involved herein are sections 2409 and 213 of the Evanston Municipal Code of 1927, as amended. Section 2409 provides as follows:

"No person shall obstruct or encumber any street corner or other public place in the City by lounging in or about the same after being requested to move on by any police officer; any person violating any of the provisions of this section shall be fined not less than five dollars nor more than fifty dollars for each offense."

The complaint filed against defendant as to the foregoing ordinance, omitting the formal parts thereof, was as follows:

"Frederich S. Caselberry being first duly sworn, on his oath deposes and says that Charles Ward the defendant in this cause * * * on the 9th day of July A.D. 1947, at the City of Evanston * * * Did then and there refuse to move after requested to do so. To wit: Asbury Avenue and Emerson Street in violation of Section 2409 of the Evanston Municipal Code of 1927, as amended.

Frederich S. Caselberry

John B. Treff
Clerk of the Municipal Court
of Evanston.

44327

ALTON, ILL. CHAMBERLAIN
COURT OF EVANSTON

APPELLANT
v.
APPELLEE

THE COURT HEREBY GRANTED THE PRAYER OF THE PETITION.
Two complaints were filed in the Municipal Court of
Evanston charging the defendant, Chamberlain, with violating
two separate ordinances of the City of Evanston. The two
cases were tried together in the same judge and jury. Ver-
dicts were returned finding the defendant guilty and assessing
a fine of five dollars against him on each charge. Judgments
were entered on the verdicts and defendant appeals.
The ordinances involved herein are sections 2409 and
2411 of the Evanston Municipal Code of 1927, as amended.
Section 2409 provides as follows:

"To prevent any obstruction or impediment to any street corner
or other public place in the City by loitering in or about the
same after being requested to move on by any police officer;
any person violating any of the provisions of this section
shall be fined not less than five dollars nor more than fifty
dollars for each offense."

The complaint filed against defendant as to the first
violation ordinance, stating the facts thereof, was as
follows:

"Petitioner S. Chamberlain being first duly sworn, on his
oath deposes and says that whereas the defendant in this
case ** on the 9th day of July A.D. 1927, at the City of
Evanston ** Did then and there refuse to move after requested
to do so. To wit: Lacey Avenue and Emerson Street in violation
of Section 2409 of the Evanston Municipal Code of 1927, as
amended.

Frederick S. Chamberlain
John S. Tiller
Clerk of the Municipal Court
of Evanston.

-2-

Subscribed and sworn to

before me this 10th day By L. J. Jones
of July A. D. 1947." Deputy.

Section 213 of said code provides as follows:

"Whoever in the City shall resist any member of the police force in the discharge of his duties, or shall in any way interfere with or prevent or hinder him in the discharge of his duty as such member, or shall offer or endeavor to do so, and whoever shall in any manner assist any person in the custody of any member of the police force to escape or attempt to escape from such custody, shall be fined not less than five dollars nor more than two hundred dollars."

The complaint filed against defendant as to this ordinance, omitting the formal portions thereof, was as follows:

"Frederich S. Caselberry being first duly sworn, on his oath deposes and says that Charles Ward the defendant in this cause * * * on the 9th day of July A. D. 1947, at the City of Evanston * * * Did then and there resist an arrest, to wit, Asbury Avenue and Emerson Street in violation of Section 213 of the Evanston Municipal Code of 1927, as amended.

Frederich S. Caselberry

John B. Treff
Clerk of the Municipal Court
of Evanston

Subscribed and sworn to

before me this 10th day

of July A. D. 1947."

By L. J. Jones
Deputy

The only error assigned for reversal is that neither of the complaints stated a cause of action and they were therefore insufficient to sustain the verdicts and judgments.

In the act under which the Municipal court of Evanston was established (pars. 442-504, chap. 37, Ill. Rev. Stat. 1947) certain civil cases are designated as cases of the fourth class (sec. 2, par. 444) and fourth class cases must be commenced by filing a statement of the nature of plaintiff's claim (sec. 19h, par. 469 (a)). A prosecution for violation of a municipal ordi-

Subscribed and sworn to

before me this 14th day of July, 1949.

W. L. Jones
Notary

Section 213 of said code provides as follows:

"However in the city shall remain any member of the police force in the discharge of his duties, he shall in any way interfere with or obstruct in any manner in the discharge of his duty as such member, or shall offer or endeavor to do so, and whoever shall in any manner assist any person in the removal of any member of the police force from the city shall be guilty of a misdemeanor, and shall be fined not less than five dollars nor more than one hundred dollars."

The complaint filed against defendant as to this ordinance,

omitting the former portions thereof, was as follows:

"Richard E. Caspberry being first duly sworn, on this

oath deposes and says that Charles and the defendant in this

cause: * * * on the 9th day of July A. D. 1947, at the City of

Vanastan * * * did then and there commit an arrest, to wit,

Labary Vorne and Emerson, first in violation of Section 213 of

the Vanastan Municipal Code of 1937, as amended.

Richard E. Caspberry

John T. West

Just of the Municipal Court
of Vanastan

Subscribed and sworn to

before me this 14th day

of July A. D. 1949.

W. L. Jones
Notary

The only error sustained for reversal is that neither of

the complaints stated a cause of action and they were therefore

insufficient to sustain the verdict and judgment.

In the last matter which the Municipal Court of Vanastan

was established (para. 442-443, chap. 37, Ill. Rev. Stat. 1947)

certain civil cases are designated as cases of the former class

(sec. 2, para. 441) and fourth class cases must be commenced by

filing a statement of the nature of plaintiff's claim (sec. 191,

par. 409 (a)). A prosecution for violation of a municipal ordi-

nance is a civil proceeding for the collection of a penalty and is included in cases of the fifth class (sec. 2, par. 444). Section 26 (par. 477) of said act provides that the practice in cases of the fifth class shall be the same, as near as may be, as the practice in cases of the fourth class. Therefore the complaints filed herein against the defendant stand as statements of plaintiff's claim against him for his alleged violation of the two ordinances and must state a cause of action.

In City of Chicago v. Lesser, 196 Ill. App. 37 (abst.), the court said that "a complaint charging defendant with violating a city ordinance, sufficiently describes the offense and the ordinance violated, where the ordinance was described by the number of the section of the Municipal Code, and the acts he was charged with doing were also specifically set forth." City of Chicago v. Baranov, 189 Ill. App. 25, is to the same effect.

As heretofore shown, the ordinances the defendant was charged with violating were described in the respective complaints by their section numbers in the Municipal Code of Evanston and both complaints were signed and verified by the police officer who arrested him. Each of the complaints set forth that said police officer "saw defendant commit said offense above mentioned" and then and there arrested him.

The specific act with which defendant was charged as constituting an offense against section 2409 of said Code was that he refused to move from the street corner at Asbury avenue and Emerson street, after having been requested to do so by a police officer.

The specific act with which defendant was charged as constituting an offense against section 213 of said code was

notice is a civil proceeding for the collection of a penalty and is limited in cases of the Fifth class (see, e.g., sec. 140, section 10 (par. 477) of said act provided that the practice in cases of the Fifth class shall be the same, as near as may be, as the practice in cases of the Fourth class. Therefore the complaint filed herein against the defendant stands as statements of claim for relief against him for his alleged violation of the two ordinances and said state's cause of action.

In City of Chicago v. Leary, 100 Ill. App. 3d 100 (1982), the court said that "a complaint charging a defendant with violating a city ordinance, intentionally described the offense and the ordinance violated, recited the evidence and described by the nature of the action of the defendant, and the facts he was charged with doing were factually set forth." City of Chicago v. Leary, 100 Ill. App. 3d 100, 101 in the same effect.

As heretofore shown, the defendant the defendant was charged with violating, were described in the respective complaints by their section numbers in the respective code of ordinance and both complaints were signed and verified by the police officer who arrested him. Each of the complaints set forth that said police officer "was told that said defendant committed said offense above mentioned" and then and there arrested him. The specific act with which defendant was charged as constituting an offense against section 209 of said Code was that he refused to move from the street corner at Twenty Avenue and Madison Street, after having been requested to do so by a police officer.

The specific act with which defendant was charged as constituting an offense against section 213 of said Code was

that he resisted an arrest by a police officer at the street corner at Asbury avenue and Emerson street.

While both complaints were somewhat loosely drawn, we think that they sufficiently apprised the defendant of the nature of the offenses with which he was charged and stated a good cause of action. In our opinion, the complaints were not fatally defective and the most that can be said of them is that the causes of action set forth therein were defectively stated. The rule is that, when a complaint states a cause of action as to a violation of a municipal ordinance, although defectively, objection can be raised only by a motion for a rule on the plaintiff to file a more specific statement of claim. Defendant should have filed such a motion as to both complaints, if he considered the allegations contained therein were too general or not definite enough to suit him.

We are impelled to the conclusion that the complaints were sufficient to support the verdicts and judgments.

The judgments of the Municipal court of Evanston are affirmed.

JUDGMENTS AFFIRMED.

Friend, P. J., and Scanlan, J., concur.

that he resided in a house at the corner of Third Avenue and Madison Street.

While both complaints were somewhat loosely drawn, we

think that they sufficiently reflected the substance of the nature of the offenses with which he was charged and stated a good cause of action. In our opinion, the complaints were not legally defective and we are of the opinion that it is that the cause of action set forth therein were legally stated. The rule is that, when a complaint states a cause of action as to a violation of a municipal ordinance, although factually,

objection can be raised only by a motion for a writ on the complaint to file a more specific statement of claim. Defendants should have filed with a motion to both complaints, if he considered the allegations contained therein were too general or not definite enough to suit him.

It was replied to the contention that the complaints were sufficient to support the verdicts and judgments.

The judgment of the Municipal Court of Vancouver and

affirmed.

THE COURT'S DECISION.

Wm. J. J. and others, vs. the City of Vancouver.

file with 335-227
Gen no 10293

Gen. No. 10293.

Agenda No. 4.

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT.
OCTOBER TERM, A.D. 1948.

JOHN PLAIN ESTATE,

by John T. Plain,

Appellee,

vs.

W. J. GOLDEN,

Appellant.)

335 I.A. 227²

) Appeal from
) Circuit Court,
) Kane County.
)
)
)
)
)
)

WOLFE,-- P. J.

A forcible entry and detainer suit was brought by the plaintiff in a Justice of the Peace Court in Kane County, Illinois, to recover possession from the defendant certain premises in Aurora, Illinois, which were operated by the defendant as a hotel. Trial was had in the Justice Court and judgment entered for the plaintiff, from which the defendant appealed to the Circuit Court of Kane County, and demanded a jury.

The plaintiff filed a motion supported by an affidavit for a summary judgment, as provided in our Civil Practice Act and Rules of the Supreme Court. The plaintiff's affidavit set forth the leasing of the premises in question, which was an oral

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT.
OCTOBER TERM, A.D. 1948.

3351-284

JOHN PLAIN ESTATE,
by John T. Plain,
Appellee,
vs.
W. J. GILBERT,
Appellant.

Appeal from
Circuit Court,
Kane County.

JOHN T. PLAIN, JR.

A forcible entry and detainer suit was brought by the plaintiff in a Justice of the Peace Court in Kane County, Illinois, to recover possession from the defendant certain premises in Aurora, Illinois, which were operated by the defendant as a hotel. Trial was had in the Justice Court and judgment entered for the plaintiff, from which the defendant appealed to the Circuit Court of Kane County, and demanded a jury.

The plaintiff filed a motion supported by an affidavit for a summary judgment, as provided in our Civil Practice Act and Rules of the Supreme Court. The plaintiff's affidavit set forth the leasing of the premises in question, which was an oral

2.

one on a month to month basis; that plaintiff had given the defendant thirty days' notice to terminate the lease, which was duly served on the defendant in which it is alleged that plaintiff was entitled to the possession of the premises, and that the defendant unlawfully withheld possession thereof.

The defendant filed his reply and also an affidavit in support of the same, in which it is alleged that a new oral tenancy agreement had been entered into with the plaintiff for a term of ten months for a valuable consideration therefor, and that the thirty days' notice of termination served upon the defendant, was not applicable and of no force and effect. The defendant's affidavit stated that there had been an agreement entered into between the plaintiff and the defendant whereby there was to be an increased rent of forty dollars per month for a ten-month period, because of the tenant agreeing to pay one-half of the price of installing certain fire escapes ordered by the fire marshal on said building, and that by reason of these premises a new tenancy was created.

This case was before this Court in *Plain v. Golden*, 334 Ill. App., 264, in which the now appellee was trying to collect extra rent that was alleged, (now) appellant had agreed to pay for installing a fire escape in the premises now in litigation. We there held that such a promise was unenforcible. The appellant now insists, by their affidavits that such a promise was a valid consideration to support a new lease. The argument of counsel is contrary to their former position and not tenable.

one of a number of similar cases; that plaintiff was the
defendant thirty days; that the defendant was the plaintiff, which
was duly served on the defendant in 1911, it is alleged that
plaintiff was entitled to the possession of the premises, and
that the defendant unlawfully withheld possession thereof.
The defendant filed his reply and also an affidavit
in support of his case, in which it is alleged that a new lease
tenancy agreement had been entered into with the plaintiff on
a term of ten years for a valuable consideration of \$100, and
that the thirty days' notice of termination served upon the defen-
dant, was not applicable and of no force and effect. The defen-
dant's affidavit stated that there had been no agreement entered
into between the plaintiff and the defendant whereby there was to
be an extended term of forty years or longer than a ten-year
period, because of the former agreement to pay one-half of the
cost of maintaining certain fire escapes owned by the fire
department, and that by reason of such promise
a new tenancy was created.
This case was before this court in *Plain v. City of St. Louis*, 224
Mo. App. 202, in which the new lease was found to be void
extra facts that were alleged, (now) plaintiff was agreed to pay
for maintaining the fire escapes in the premises now in litigation.
The court held that such a promise was unenforceable. The plaintiff
now insists, by their affidavits that such a promise was made
in consideration to secure a new lease. The argument of counsel
is contrary to their former position and not tenable.

3.

It is our conclusion that the affidavit of defendant did not state any legal defense to the plaintiff's suit for possession of the premises, and the trial court properly rendered judgment in favor of the appellee.

The judgment of the trial court is hereby affirmed.

Judgment affirmed.

It is our conclusion that the affidavit of defendant
did not state any legal defense to the plaintiff's suit for
possession of the premises, and the trial court properly
rendered judgment in favor of the appellee.
The judgment of the trial court is hereby affirmed.
Judgment affirmed.

Abstract

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

OCTOBER TERM, A. D. 1947

Gen. No. 10187

Agenda No. 9

JOHN SCHEIDLER,
Plaintiff-Appellee,

vs

ESTHER R. HAUGHT, Executrix of
the Last Will and Testament
of Mary E. Orth, Deceased,
Defendant-Appellant.

An Appeal from
Circuit Court
Carroll County.

Hon. Leon A. Zick,
Judge Presiding

335 I.A. 228

BRISTOW, J.

The controversy that has given rise to this appeal follows a pattern that is so frequently found in the settlement of estates. John Scheidler, the plaintiff-appellee, was a man about the age of eighty years, and he had performed many services for his friend, the decedent Mary Orth, who was also about eighty. John fully expected Mary to leave him all of her worldly goods when she died, but the last will of Mrs. Orth sent them elsewhere,--hence, a claim by John against her estate for various items, which resulted in a victory for the claimant in both the Probate and Circuit Court.

Mary Orth had lived with claimant for several years, and John had been her agent and errand boy in transacting most of her business for the past ten years prior to her passing. What that business consisted of does not fully appear from the record. The record is silent on the extent of her property, excepting there is one item that appears in the claim where claimant is making a charge for repairing a fence on eighty acres. John had an automobile, and he hauled Mary everywhere, from the farm

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Gen. No. 10187

1990

to Lanark, to Savanna, to Freeport, to the doctor, to the lawyer, and to the hospital, and so on. There was admitted in evidence an account book which was ordered transmitted to this court for personal examination. This book contains more than a hundred items showing charges made from 1936 to October, 1941. They range in importance and amounts from ten cents for a mouse trap and cheese to 318 days board and room at the rate of \$20 per week. About a third of the smaller items consisted of taking Mary in his automobile for which comparatively nominal charges were made. The evidence indicates that there was no charge made for his time in making the trips.

The record indicates that during the last few years of Mary's lifetime she lived in the home with claimant and his wife at Lanark, Illinois, and was afflicted with cancer. Frequently she was confined to her bed and required much attention.

About the first of October, 1939, Scheidler obtained from Mrs. Orth a deed to a house located at Broad and Dane Streets in Lanark, Illinois, wherein Mary reserved for herself a life estate and received the sum of seven hundred dollars. In September, 1939, Scheidler entered into a lease with Mrs. Orth by which he was to have possession of the Lanark property on March 1, 1940 or sooner if the present tenant moved out. This agreement recited that Scheidler was not to pay any money rent, but in lieu thereof was to decorate the rooms, pay all taxes, and one-half of the expense of installing a modern toilet. Mrs. Orth reserved unto herself the use of a large room on the second floor. They were each to pay one-half of the insurance. Then, there was an agreement pertaining to the disposition of two vacant lots which adjoined this property, which agreement has very little to do with the present controversy and deserves no space in this opinion.

Appellant has charged in this appeal that there was a fiduciary relationship existing between Scheidler and Mrs. Orth, and that Scheidler exercised his position of dominance and superiority over Mrs. Orth unfairly and much to her disadvantage, and that through^{out} these proceedings it was incumbent upon the plaintiff to show by clear and convincing evidence that he was entitled to the claims he has ascertained.

The appellant herein in many places in her brief has charged that Scheidler fraudulently obtained a conveyance to the Lanark property without paying Mrs. Orth what it was reasonably worth. There is very little in the record to indicate the fair cash market value of this property. It was an unmodern frame dwelling house in a small town, and was rented at \$10 per month. It was well within the power of the defendant to produce evidence on the value of this property if there was any great disparity between what was paid and what it was actually worth. A criterion that is oftentimes employed by real estate experts in fixing the value of real estate is there should be a dollar a month rental for every one hundred dollar valuation. Using that "yard stick", there would be a valuation of \$1000 for this property. The life estate which Mrs. Orth reserved would have some value. We, therefore, do not believe the record justifies us holding there was any confidence violated by the claimant in this transaction.

The principal ground for reversal urged by appellant invites more serious consideration. The claimant was called as a witness and testified that he had been acquainted with Mary Orth for her life time. On the trial, he produced Plaintiff's Exhibit 1, which was a book of account between him and Mary as to services rendered her by him, and he testified that the entries on specific pages were original ones and that same were correct. On cross examination, the attention of the claimant was called to a number of items where there were erasures and new

figures placed over the erasures. In the main, these items are small and when asked about each of them, the claimant would readily admit that there had been erasures, and in some instances would explain that when the original entry was made it might have been one figure, but later that same service or money paid out by him became increased and instead of entering new items he would erase the old figure and write in its stead the one that later appeared to be the proper figure.

Defendant's exhibit 3, offered and admitted in evidence,

was as follows:

"June 6	Clarence Speer	\$5.00
June 9	Gave Nurse	1.00
June 9	Six Oranges	.25
June 10th	Two nighties	1.00
June 11	Grape Fruit	.20
June 19	rubbing alcohol	.40
June 22	Gause bandages	.36
	One sewer Trap for house	2.51
		<hr/> 10.72

Received	\$30.00 From Mary
Bills Paid	10.72

Due Mary	19.28	"
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The same items as listed above also appear on page 9 of claimant's book account. Claimant, upon being asked at the trial about charging for items for which he had already been paid, said, "I can't explain that." Then the following question was asked and the following answer made: Question:

"Mr. Scheidler, will you show me in this book an item of this \$30.00 you admit you received from her and this \$10.72 for items you have entered in this book, and this balance of \$19.28?"

Answer: "I know I was careless doing business for Mary Orth but I know she got that \$19.28." Upon the examination of Scheidler when called as a witness by the defendant, it was shown that he had taken care of Mrs. Orth's affairs until she left his house in April, 1941, and that the last thing she said upon leaving was, "I have made a will in your favor. I will never change it or make another because you have done more for me than any other

living persons." He also testified he knew she had a will made in his favor because he had seen it. The following questions and answers then ensued: Q. "All these things you had been doing for Mrs. Orth over the years was in expectation of what you got under the will." A. "I am afraid so." Q. "At the time you didn't have any intention of charging her for them?" A. "She said, 'You are going to have it all anyway.' That is the reason I did it so loosely. The last year she failed in her mind. Mrs. Orth was a good woman. I sold the two lots west of the garage, mentioned in this lease to Mrs. William Deitrich and gave Mrs. Orth the money. The account book didn't need to show it because we gave it to her."

Claimant's Exhibit 4 reads as follows: "Jan. 15, 1938 John Schilder If any thing should happen to me why charge the time and say nothing about the work for you done more for me than any of my folks. Mary E. Orth." In support of the claimant's case, several witnesses were called. Roy Bray, the cashier of the local bank, testified among other things, that it was Mrs. Orth's signature that appeared on Plaintiff's Exhibit 4. E. B. Payne testified that he had seen claimant performing carpenter work for Mrs. Orth in construction of a garage, and that \$3.00 a day for such work was a fair and usual charge. Payne said that Scheidler had obtained the lumber used in the construction of the garage from the tearing down of an old building. These are some of the items that appeared in the book account. Dr. Wm. J. Scholes was the doctor treating Mary Orth. He testified that Mrs. Orth was bedfast part of the time in question and required much attention, and that the services rendered and board furnished by Schiedler was reasonably worth from \$18 to \$40 a week. He also testified that John Scheidler would often come to his office to procure medicine for her. Alvin Sword testified that he lived in Lanark near the Scheidlers; that he had known Mr. Scheidler and Mrs. Orth for many years; that he

would visit back and forth with Mrs. Orth and the Scheidlers; and that during the time in question she had bad spells and on many occasions was confined to her room where her meals were served to her. He also testified that frequently he would see Mrs. Orth leaving the home with Mr. Scheidler in his car. Robert Lindsay testified that he had lived in the Scheidler home prior to its occupancy by Mr. Scheidler, and that he paid a rental of \$10 per month; that a sewer was put in while he was occupying the premises; and that he paid the rent to Mr. Scheidler. There are several items that appear in the account book which indicate charges made for bringing Mrs. Orth to Lanark to see a sewer. Wales Gossard testified he had been a school teacher there for 25 years; that he is distantly related to John Scheidler; and that John Scheidler was not related to Mary Orth. He also testified he had occasion to visit in their home when Mrs. Orth was living with the Scheidlers, and he detailed the many services and kindnesses rendered Mary Orth by the Scheidlers. Wales Gossard's wife, Marion Gossard, testified to the same effect.

On behalf of the defendant, there was called a handwriting expert, George W. Schwartz, who testified that he had examined the account book in question as an expert, with his instruments; that he was able to read the figures underlying those that appeared on the erasure marks; and that the total discrepancy in the debit items amounted to \$868. We might observe that \$817 of this is involved in the account on Page 11 of Exhibit 1 concerning forty-five weeks of board and care at \$20 per week. In addition to the payment which appears in Defendant's Exhibit 3, as heretofore discussed, the only other evidence of any payment made by Mrs. Orth to claimant was that as evidenced by Defendant's Exhibit 2. We gather therefore that the claimant received \$148

as reimbursement for moneys expended by him for her hospital and nursing bills. It seems quite significant, indeed singular, that there were ^{no} other ^{no} payments made by decedent to claimant for the many and long continued services rendered, ^{which} lends support to the conclusion that Scheidler had never been adequately paid for such services.

It appears indisputable that the claimant in this case rendered Mary Orth indispensable service for a long period of time. There isn't any question but what Mrs. Orth did not expect to enjoy these valued services without paying for them, and it is equally apparent the claimant did not expect to render them without being paid. As was indicated by the testimony of claimant upon cross examination, he expected to be taken care of by Mrs. Orth in her will. The plaintiff was not related in any way to the decedent, and there can be no presumption that his services were gratuitously performed. We think the record abundantly supports the view that the rendition and acceptance of the services of the claimant were under the implied understanding, if not expressed, that they should be compensated for and were not to be performed simply through love and affection.

Two courts have heard the claimant testify. They have heard his explanation as to the erasures and discrepancies. They have had an opportunity to look at the claimant when he was testifying and ascertain much as to his candor, honesty and frankness that the written page does not disclose. Two courts have determined after all of these advantages that they have in ascertaining where the truth lies, that John Scheidler has made out an honest claim against the decedent's estate. John was an old man of 80 years, not experienced in business accounting and bookkeeping. He said that his work was carelessly done because he expected his compensation to come from the will of Mrs. Orth for she had often told him, "You are going to get all I have anyway." The courts were in excellent position to determine

as reimbursement for money expended by him for her hospital and nursing bills. It seems quite significant, indeed sinister, that there were other payments made by defendant to claimant for the many and long continued services rendered, in his support to the conclusion that defendant had never been adequately compensated for such services.

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have heard his explanation as to the expenses and discrepancies. They have had an opportunity to look at the claimant when he was testifying and ascertain much as to his order, honesty and frankness that the written page does not disclose. The counts have determined after all of these advantages that they have in ascertaining where the truth lies, that John Schellier has made out an honest claim against the decedent's estate. John was an old man of 87 years, not experienced in business accounting and bookkeeping. He said that his work was completely done because he expected his compensation to come from the will of Mrs. Orth for she had often told him, "You are going to get all I have anyway." The counts were in excellent position to determine

whether John's explanation of the many irregularities was worthy of credence.

We are of the opinion, therefore, that the judgment entered herein should be affirmed.

JUDGMENT AFFIRMED

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STATE OF ILLINOIS
APPELLATE COURT
FOURTH DISTRICT
OCTOBER TERM
A. D. 1947

A

Term No. 47026

Agenda No. 19

RAYMOND O. PIPER,
(Plaintiff) Appellant,
vs.
DOWELL, INCORPORATE,
(Defendant) Appellee,
Consolidated for trial with
COLEMAN RODGERS,
(Plaintiff) Appellant,
vs.
DOWELL, INCORPORATED,
(Defendant) Appellee.

Appeal from the
Circuit Court of
Edwards County

363

335 I.A. 337

BARTLEY, P.J.

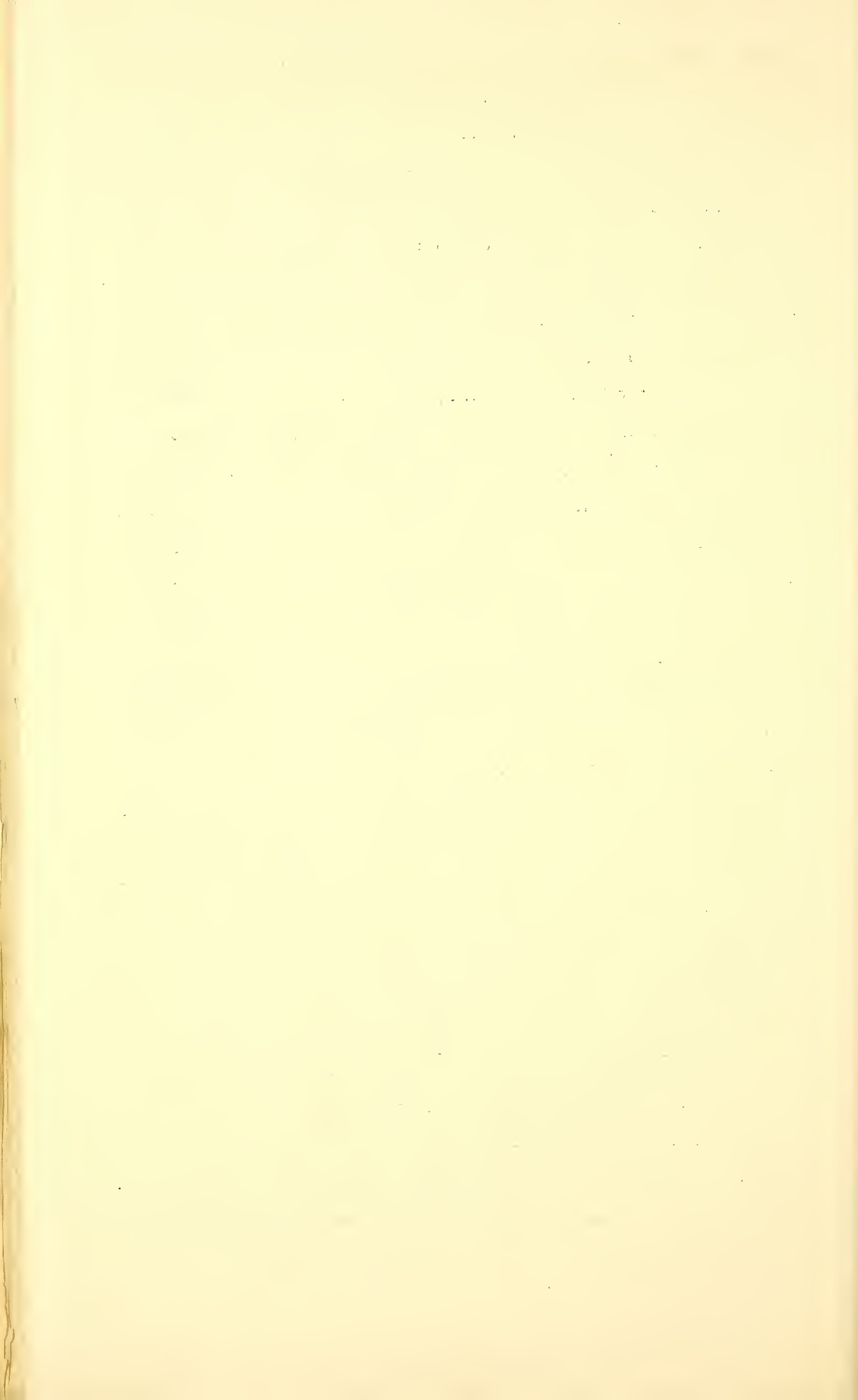
The Circuit Court of Edwards County at the conclusion of all the evidence in the consolidated cause, gave a directed verdict for the defendant, and it is the correctness of this action by the court that is herein appealed.

Each of the plaintiffs brought suit against the defendant for alleged negligence as a result of a collision between the automobile in which the plaintiffs and three other persons were riding and a truck of the defendant. The automobile was owned by plaintiff Piper and driven by plaintiff Rodgers. The parties are in accord as to the law, and the sole question before the court here, is whether the evidence taken in its light most favorable to the plaintiffs, together with all legitimate conclusions drawn therefrom, fairly tends to sustain plaintiffs cause of action.

There was evidence to the effect that on the morning of March 26, 1944, defendant was driving his truck in a northerly direction

on State Highway #130 and that plaintiffs, driving 40 to 45 miles per hour in the same direction, approached the truck from the rear. The truck was going around a curve, the arc of which was less than 3 feet per 100 feet. There was evidence to the effect that plaintiffs could easily see for a distance of at least 400 feet. There is also evidence to the effect that when the plaintiffs approached the truck, they slowed down to 20 to 25 miles per hour and at a point of 300 feet of the truck, pulled over to the left land and speeded up to 35 to 40 miles per hour to pass the truck . . . of the defendant, and that when they were partly around the truck, the driver of the truck undertook to turn to the left on to a side road and the automobile hit the truck back of the front wheels. There was evidence to the effect that the driver of the truck failed to signal in any manner his intention to turn to the left. The driver stated that before reaching the intersection, he made a left hand signal and that when he was approximately 100 feet of the road he pulled his hand back because it was impossible to turn the truck with one hand. The truck was a tandem tank truck with six wheels and with its load, weighed more than ten tons.

Appellee argues that plaintiffs are barred from their action because the automobile in which they were riding was being driven at an unreasonable rate of speed; that they attempted to pass the truck while on a curve at the time and place when approaching within 100 feet of an intersection, all contrary to provisions of the Statute of the State of Illinois regulating traffic. There was evidence indicating that the gravel road in question is a country road, not readily discernable, and there is no marker on Highway #130 to indicate the intersection, and that while plaintiffs knew of the location of the connecting side road, they were not conscious of the fact at the time of the accident in question. There was evidence to the effect that they looked ahead and it appeared that they had ample time to pass the truck.



Both sides agree that violation of a statute is not negligence per se and does not constitute negligence or contributory negligence.

Among other cases directed to our attention is: Pfile v. Owens, 331 Ill. App. 390, where many of the facts are parallel to the facts in this case. There, as here, the court directed a verdict for the defendant on the theory that the plaintiff was guilty of contributory negligence in attempting to pass a truck at an intersection. There, as here, the plaintiff contended that the defendant negligently drove his truck onto a left-hand roadway without signalling his intention to make such a turn, in violation of the Statute, and on page 394 the court said: "At the close of plaintiff's evidence, upon motion of defendant, the court instructed the jury to find the issues for the defendant. On a motion for a directed verdict, plaintiff's evidence is entitled to the most favorable interpretation and inference the evidence will bear, and must be accepted as true. If there is any evidence tending to support plaintiff's claim, it is error to allow the motion. On a motion for a directed verdict the court cannot weigh the evidence. If there is any evidence tending to prove plaintiff's case, the motion should be denied. If a person as violating the law at the time of his injury, this will not bar a recovery, unless the unlawful act in some way contributes to the accident. Such violation is only prima facie evidence of negligence. From an inspection of plaintiff's exhibit 6, which shows the conditions that faced the plaintiff as she came up to East North First/Street, there is nothing to indicate an intersection. Driver of a car behind a truck with two service stations adjacent to each other, plus their stone driveways and double set of pumps, would be sufficiently confusing to a driver not familiar with the surroundings, so as to miss the intersecting street. This condition made it a proper case to submit to a jury, allowing them to determine as a question of fact whether or not the plaintiff

was in the exercise of due care under all the conditions and surrounding circumstances, at the time of and just before the collision." In the case of Moffitt v. Forwarding Company, 331 Ill. App. 278, the court at page 284 said: "The question of contributory negligence is preeminently for the consideration of the jury, as such negligence cannot be defined in exact terms, and unless it can be said that the action of the injured person is clearly and palpably negligent, it is not within the province of the court to substitute its judgment for that of the jury (Blumb v. Getz, 366 Ill. 273, 277). Before the question of contributory negligence can be said to be established as a matter of law, the conduct of the injured party must have been so clearly and palpably negligent that all reasonable minds would so pronounce it without hesitation or dissent (Hellwig v. Lomelino, 309 Ill. App. 369, 375)".

It is our opinion that there was sufficient evidence in the record on every material question necessary to recover, to have submitted the issues to the jury.

Judgment of the Circuit Court of Edwards County is reversed and cause remanded for a new trial. Judgment entered against defendant for costs.

REVERSED AND REMANDED.

JUDGES CULBERTSON AND SMITH CONCUR

NOT TO BE PUBLISHED IN FULL

FILED
JAN 26 1948
Stanley R. Brown
CLERK OF THE APPellate COURT



No. 10183
In The
APPEILLATE COURT OF ILLINOIS
Second District
October Term, 1947

732 A
Abstract

FRED E. HUMMEL, AS TRUSTEE IN BANKRUPTCY OF
THE ESTATE OF DOROTHEA W. HUSZAGH, BANKRUPT,

Plaintiff-Appellant,

v.

JAMES R. CARDWEIL, DOROTHEA W. HUSZAGH, FRED J.
WEGG, AS SOLE TRUSTEE UNDER THE LAST WILL AND
TESTAMENT OF FREDERICK H. WICKETT, DECEASED,
EDWARD G. BERGLUND, OSCAR S. SEAVER, AND
BARRE BLUMENTHAL,

Defendants-Appellees.

)
) Appeal
) from the
) Circuit Court
) of
) Lake County

335 I.A. 337²

Bristow, J.

This is a plenary suit in equity being a bill in the nature of a bill of review by the plaintiff, Fred E. Hummel, as Trustee in Bankruptcy of the Estate of Dorothea W. Huszagh, Bankrupt, hereinafter called the Trustee in Bankruptcy against James R. Cardwell, Dorothea W. Huszagh, Fred J. Wegg, as sole trustee under the Last Will and Testament of Frederick H. Wickett, deceased, Edward G. Berglund, Oscar S. Seaver, and Barre Blumenthal. This case comes to this court upon the pleadings. Defendants first filed verified answers to the amended complaint, then filed a motion to dismiss and for summary judgment supported by affidavits and the answers as verified were considered by the court as further affidavits in support of the motions. Defendant Dorothea W. Huszagh was the daughter of one

756 175.34

• *receding*

Frederick H. Wickett. By his last will and testament he created a trust for the benefit of his two daughters, Dorothea W. Huszagh and Marjorie Huszagh. The trust was to continue for a period of 20 years after the death of his wife. His widow renounced under the will and by reason of the renunciation on the part of the widow the legal title and possession of that part of the estate relinquished by her with other residuary assets of the estate passed to the sole trustee, the defendant herein, Fred J. Wegg, as part of the trust estate. *Hummel v. Cardwell*, 390 Ill. 526 at 529.

The trust established by the said Wickett, deceased, further provided that the income from the estate should be paid to his two daughters, including the defendant Dorothea W. Huszagh, by his trustees "as in their judgment shall seem fit." The trust estate was to exist for 20 years and upon the termination of the 20 years the trust estate was to be divided equally between his two daughters, including the defendant Dorothea W. Huszagh and in the event of death of either of the daughters prior to the termination of said trust estate leaving lawful issue of her surviving then the said trustees were to pay to such lawful issue the share which would have gone to the daughter if she were living, such issue to take per stirpes and not per capita and in the event either of said daughters die without leaving issue her surviving, then her share to go to the daughter so surviving. The will of the said Wickett, deceased, further expressly authorized and empowered his trustees from time to time to pay any part of the corpus of the trust to any of his relatives if in the opinion of said trustees they may be in want or need of assistance. After the death of the

said Frederick H. Wickett, James R. Cardwell, one of the defendants herein, having obtained a bona fide judgment against the said Dorothea W. Huszagh, filed a creditor's bill in the circuit court of Lake County against the said Dorothea W. Huszagh and the defendant Wegg, as sole trustee in said Wickett estate. The defendant Dorothea W. Huszagh filed an answer and denied that the plaintiff could reach her interest in the trust estate for the reason that the trust created by her father's will was a spendthrift trust. The Lake County circuit court entered a decree that the plaintiff was entitled to the sale of the interest of the said defendant Dorothea W. Huszagh in the trust estate and ordered the master in chancery to sell the same. This decree was entered November 17, 1939. The sale was made by the master in chancery and Cardwell, the creditor, purchased the interest, and the sale was confirmed in the said circuit court by decree December 15, 1939. There was also at that time a deficiency judgment against the said Dorothea W. Huszagh in the sum of \$533,394.15. The said defendant Dorothea W. Huszagh agreed to not appeal from the decree and sale on condition that the said Cardwell would take no deficiency judgment against her in the creditor's bill. To this Cardwell agreed and no deficiency judgment was entered. The said Dorothea W. Huszagh filed her voluntary petition in bankruptcy on August 17, 1940 and was duly adjudged a bankrupt on August 20, 1940. On October 24, 1940 the plaintiff in the instant case was appointed the trustee in bankruptcy of the estate of the said Dorothea W. Huszagh, a bankrupt. She was discharged as a bankrupt by order of court entered February 24, 1941. This was alleged in the

answer under oath of Dorothea W. Huszagh. It was further alleged in the answer of Wegg, as trustee, that he brought suit against Dorothea W. Huszagh, et al. in the circuit court of Cook County, Illinois, in which case plaintiff Hummel, as trustee in bankruptcy, was a party defendant and was served with a writ of summons and filed his answer and decree was entered April 4, 1942, finding that the circuit court of Cook County had jurisdiction over the subject matter and the parties thereto, in which the will of Frederick H. Wickett was construed; that said decree recited that all adult defendants which included said Hummel as trustee in bankruptcy for said Dorothea W. Huszagh, plaintiff in this case, had agreed and consented in open court to certain portions of the decree entered; that Fred J. Wegg as trustee in due and proper exercise of his discretion as trustee had determined that \$300.00 per month should be paid to Dorothea W. Huszagh as the natural guardian for her six minor children under and pursuant to the terms of the last will of Wickett, deceased; that no appeal was taken from said decree construing said last will and testament and the same is still in full force and effect and binding upon the plaintiff Hummel in this cause as to the present and continuing existence of the trust created by said last will of Wickett, deceased.

On November 15, 1940 the same trustee in bankruptcy filed a bill of review in the circuit court of Lake County seeking to set aside the decree and order confirming the sale entered in the suit by James R. Cardwell, heretofore mentioned. Dorothea W. Huszagh filed an answer and a counterclaim in this suit, seeking to set aside the said decrees in the creditor's bill so that she might have her

however under oath of Theodore T. Kennedy. It was further
affirmed in the absence of Kennedy, that he was not
and against Kennedy T. Kennedy, as in the above
of Cook County, Illinois, is within each Illinois
in respect to Kennedy, and it was determined that
service with a full of evidence and filed his answer and
deposition was returned April 1, 1954. Kennedy was not
court of Cook County and jurisdiction over the same
whether and the parties Kennedy, it being the fact that
which it, himself was voluntarily over all other parties
that all other parties to the case were not present
because in conformity with the rules of the court, 1954-
that it was found that Kennedy was not present in the case
to certain findings of the court which were as follows:
that in 1954, the court was advised by the
appearing witness and testimony was taken and found
by the court to be true and correct and that the
for all other parties and Kennedy to the court of
the fact that of Kennedy, Kennedy was not present in the
from the court's testimony and that will be found
and the same is filed in this case and will be found
upon the evidence which is this found to be true and
and the findings of the court are as follows:
and of itself, Kennedy.

On November 12, 1954 the court found in conformity
with a bill of lading in the above case of Kennedy
Kennedy to not enter the court and order Kennedy
also entered in the bill of lading, Kennedy
mentioned. Kennedy T. Kennedy filed his answer and
complaint in this case, Kennedy to file with the
decreed in the case of Kennedy to file with the

beneficial interest in the trust returned to her. On the hearing the chancellor dismissed both the complaint and the counterclaim of said Dorothea W. Huszagh for want of equity. From this decree the plaintiff trustee in bankruptcy appealed to the Appellate Court for the Second District of Illinois, and the defendants, Dorothea W. Huszagh and the trustee Fred J. Wegg, filed cross appeals, plaintiff contending that he was entitled to relief as prayed in the complaint and the defendant Dorothea W. Huszagh prayed that she be restored to her original condition as to the trust of her father. The Appellate Court in *Hummel v. Cardwell*, 323 Ill. App. 440 reversed the trial court in dismissing for want of equity the bill of review filed by the trustee in bankruptcy and affirmed the circuit court in dismissing the counterclaim of the said Dorothea W. Huszagh against the said James R. Cardwell and remanded the cause with directions. Separate petitions for leave to appeal were then filed by defendants and allowed, and by order of court all the appeals were consolidated, and the decision of the Supreme Court of Illinois in *Hummel v. Cardwell*, supra, filed May 23, 1945 reversed the Appellate Court in holding that the trustee in bankruptcy could recover the interest of the said Dorothea W. Huszagh in the trust estate and also affirmed the Appellate Court in affirming the decree dismissing the counterclaim of the said Dorothea W. Huszagh. By certiorari this original bill of review was taken to the United States Supreme Court, but the United States Supreme Court denied the appeal.

The trustee in bankruptcy on August 14, 1945 filed the original complaint in the instant case, and an amended complaint was filed June 12, 1946. In his amended complaint

the said trustee in bankruptcy in addition to the parties defendant in the original bill of review added as parties defendants Edward G. Berglund, Oscar S. Seaver, and Barre Blumenthal, the last three named defendants being made parties only for the purpose of discovery. These three defendants were the attorneys representing the various defendants in the prior bill of review. By the first count of this complaint the plaintiff set forth all the facts as herein set forth and stated that a cause of action created under, and arising only by virtue of, the provisions of Chap. 1, Sec. 67 (d) (2) of the Bankruptcy Act of 1938 was within one year of the bankruptcy; and that the sale price was \$16,150.36, which was an amount disproportionately small when compared to the value of her interest in the trust transferred which is alleged to have been worth at the date of the transfer no less than \$50,000.00; that as a matter of law and under the provisions of the Bankruptcy Act cited said transfer was constructively fraudulent. Plaintiff prayed that the transfer be declared null and void as to the plaintiff trustee in bankruptcy and that defendant Cardwell be allowed security for the repayment of the said \$16,150.36 and for such other relief as may be equitable.

Count two of the amended complaint is founded upon the same provisions respecting fraudulent transfers contained in Chap. 1, Sec. 67 (d) (2) of the Bankruptcy Act, except that, instead of being based upon a transfer without regard to the bankrupt's constructive intent, it is based upon the bankrupt's actual intent as distinguished from intent presumed in law to hinder, delay, or defraud either existing or future creditors.

Count three of the amended complaint is founded upon the provisions concerning transfers which are deemed to be fraudulent or voidable under any federal or state law applicable thereto. In particular as to Chap. 1, Sec. 70 (e) of the Bankruptcy Act that any transfer by a bankrupt which under any federal or state law applicable thereto is fraudulent as against a creditor or voidable for any other reason by any creditor of the debtor, having a proveable claim under this act, shall be null and void as against the trustee in bankruptcy of such debtor, and also under Section 4 of the Illinois Statute on Frauds and Perjuries, being a conveyance to defraud creditors. The prayer of this count is the same as the prior counts with the exception that discovery is also prayed in connection with the fraudulent transfer.

Count four is in the alternative and, after alleging all the facts as alleged in the other counts, asks that if the transfer by the bankrupt to Cardwell be held to be valid because not a fraudulent transfer that then the said Cardwell holds the property transferred upon a secret and undeclared trust for the benefit of the said Dorothea W. Huszagh so that she directly and through the immediate members of her family, including her own children and her sister Marjorie and her husband and children, and others is entitled to receive a beneficial interest therein from said Cardwell which beneficial interest is a part of the assets and properties owned by the said Dorothea W. Huszagh which are subject to administration by the trustee in bankruptcy as part of her estate in bankruptcy; and asks for discovery, praying that the true nature and extent of the said beneficial interest of the said Dorothea W. Huszagh be disclosed; and that the plaintiff be decreed to be the owner of said

beneficial interest. The specific prayer for relief in this count is that the plaintiff, in addition to praying discovery as to the interest of the defendant Dorothea in all her part of the interests in the trust transferred to and held by the said Cardwell, asks further that the plaintiff may be decreed to be the owner of the beneficial interest of the said Dorothea W. Huszagh in the interests of the said Dorothea W. Huszagh in the said trust estate transferred to and held by the said James R. Cardwell.

To this complaint the defendants have filed a motion to dismiss complaint and for summary judgment supported by affidavits setting out all the facts of the prior litigation in the original bill of review by said trustee in bankruptcy and the creditor's bill referred to in the complaint denying all fraud or secret trust. The motion to dismiss is based upon; first, that the defendant has stated unfounded conclusions and does not state facts which indicate that the trustee in bankruptcy has a cause of action; second, that the plaintiff's cause of action is res judicata; and third, that the plaintiff is barred by laches and the statute of limitations; fourth, that the plaintiff is estopped to bring the suit; fifth, that the plaintiff is barred by Section 67 (a) (1) of the Bankruptcy Act which limits the trustee to setting aside decrees entered within four months prior to the date of the filing of the petition in bankruptcy.

It is to be noted that plaintiff in each count of his complaint from the facts alleged is attempting to reach all the right, title, and interest of the defendant Dorothea W. Huszagh in the trust established by the will of Frederick H. Wickett, deceased. He has alleged that the said defendant Dorothea under the trust is the sole owner of, first, a vested equitable life estate for 20 years in

beneficial interest. The specific prayer for relief in this account is that the plaintiff, in addition to having its share as to the interest of the defendant removed on all her real

an undivided one-half of the trust estate created for her benefit; and second, a vested equitable remainder interest in an undivided one-half of the trust estate. The motion to dismiss and for summary judgment was considered by the court, supported by the affidavits in support thereof and also by the verified answers filed with the amended complaint which were considered as additional affidavits in support of the motion to dismiss and for summary judgment. The court dismissed the complaint for want of equity. From this decree plaintiff trustee in bankruptcy appeals.

The trustee in bankruptcy, after the hearing before the court, filed verified affidavits in opposition to the motions. These were not brought to the attention of the court. If these affidavits present any new question they can not be considered in this court. An issue not presented to the trial court can not be ~~first~~ presented for the first time on appeal. *Lenhart v. Miller*, 375 Ill. 346, at 357; *Holmes v. First Union Tr. and Sav. Bank*, 362 Ill. 44 at 49. Plaintiff maintains his right to file these counter-affidavits under Section 48 of the Practice Act, being Sec. 172, Para. 3, Ill. Rev. St. 1947, State Bar Assn. Ed., p. 2535. However, he has misquoted this section. He omitted the word " 'if' upon the hearing of such motion the opposite party shall present affidavits, etc." A careful reading of Section 48 shows plainly that the court will consider the motion to dismiss without counter-affidavits if none were on file at the time of the hearing.

We must bear in mind that on a motion to dismiss there is admitted only such facts as are well pleaded and not con-

clusions of the pleader. Barzowski v. Highland Park State Bank, 371 Ill. 412; Harris v. Ingleside Building Corp., 370 Ill. 617 at p. 626. To maintain a bill of review to open up a decree on the ground of fraud, charges and proof of fraud must be clear and conclusive. Kurtzon v. Kurtzon, 395 Ill. 73 at p. 79.

Bills of review or bills in the nature of bills of review are divided into three classes: 1. bill to correct error appearing on the face of the record; 2. bills to introduce newly discovered evidence; 3. bills for fraud impeaching the original transaction. Wood v. First Nat. Bank of Woodlawn, 383 Ill. 515 at pages 520 and 521.

In the original complaint filed by the trustee in bankruptcy on November 15, 1940, the ground for setting aside the decree in the creditor's bill was for error apparent upon the record. In the four counts of the complaint there is no allegation of newly discovered evidence. In the first three counts of the complaint there is an attempt to impeach the original transaction on the grounds of fraud. "One alleging fraud in the procurement of a judgment must allege specific facts. The use of the term 'fraudulent' does not set forth a fact, but it is merely a term which is descriptive or abusive." Dean v. Kellogg, 394 Ill. 495, at p. 502. Granting that fraud is set up, it is insufficient. In discussing what fraud will nullify a judgment or decree, in People v. Sterling, 357 Ill. 354, at p. 364, our Supreme Court said: "In considering this point it must be borne in mind that there are two classes of fraud drawn in question in cases of this kind: first, there is that kind of fraud which prevents the court from acquiring jurisdiction or

merely gives it colorable jurisdiction; and second, that kind of a fraud which occurred in the proceedings of the court after jurisdiction had been obtained, such as perjury, concealment, and other chicanery. The first variety of fraud will invalidate the decree, rendering it an entire nullity. On the other hand, it is well established that the second class has no such legal effect." The facts as set forth in the complaint do not set up an action for fraud in acquiring jurisdiction nor giving the court colorable jurisdiction. The trustee in bankruptcy has further alleged that in *Hummel v. Cardwell*, supra, the decision of the Supreme Court, holding that the said Dorothea W. Huszagh could not set aside these decrees in a collateral attack, is binding upon her. At page 536, the Supreme Court there said: "The trial court had full jurisdiction to pass upon all questions at issue in that case, including the controversy as to whether or not the will of Frederick H. Wickett created a spendthrift trust. Dorothea W. Huszagh is now estopped from litigating those questions again in a bill of review case." The fraudulent allegations are merely conclusions of the pleader, but, if properly pleaded, are not sufficient to set aside the decrees in the creditor's bill.

This brings us to the fourth count of the complaint which, by conclusions, sets up that there was a secret and undeclared trust for the defendant Dorothea W. Huszagh now held by the said defendant Cardwell, the creditor. Here again we are faced with the proposition that it is a mere conclusion of the pleader, and the facts as alleged and included in the fourth count do not bear out such a conclusion. The prayer of the fourth count of the complaint does not conform to the facts pleaded, and, therefore, does not add

were first in colorable testimony; and second, that kind
of a fraud which occurred in the proceedings of the court
after investigation had been made, and as a result, the
court cut, and after a hearing. The first witness of course
will investigate the books, regarding it as entire matter.
On the other hand, it is well established that the witness
should have no other basis of testimony. The books are not to be
the constant of the court and the fact is that the
investigation was made by the court and the testimony.
The trustee in bankruptcy was further killed and in some
v. trustee, and the trustee of the trustee court, holding
that the trustee of the trustee court was not a trustee
because in a bankruptcy case, it is a trustee. The
page 100, the trustee court was not a trustee court
and full investigation is made and all questions as to the
trustee, including the trustee's testimony as to the
the bill of exchange in which the trustee is a trustee.
trust. The trustee is not a trustee and the trustee
trust trustee is not a trustee. The trustee
last allegations are not correct. The trustee is
it properly stated, we are not entitled to set aside the de-
clared in the trustee's bill.

This brings us to the fourth count of the complaint
and, by comparison with the first three counts, we
substantiated them for the defendant's position. The trustee
said for the trustee's testimony, and the trustee
again we are faced with the proposition that it is a
conclusion of the trustee, and the facts as alleged in the
count in the fourth count do not justify such a conclu-
sion. The prayer of the fourth count of the complaint was
not confined to the facts alleged, and, therefore, does not

anything new to the complaint. No facts are properly in issue unless charged in the bill and no relief can be granted for matters not charged. It is fundamental that a party must stand or fall by the case made by his bill. Rice Co. v. McJohn, 244 Ill. 264 at p. 271. To the same effect, Crowder v. Nuttall, 285 Ill. App. 254, at p. 258; Walsh v. Walsh, 372 Ill. 254.

This court can find no new cause of action in this complaint that could not have been made under the prior complaint which has already been litigated to the Supreme Court of the United States. No leave of court was obtained before the instant complaint was filed which would have been necessary had newly discovered evidence been involved.

J. B. Inderrieden Co. v. Gill, 373 Ill. 180.

The necessary parties to this complaint are the same as in the prior complaint. The defendants Berglund, Seaver, and Blumenthal are made parties defendant, but have no interest in the subject matter, and are merely witnesses from whom the trustee in bankruptcy was attempting to obtain discovery.

In the fourth count of the complaint, counsel has sought to make it appear that Dorothea W. Huszagh has some new or different interest in the trust by calling it a different name or indulging in some legal sophistry or reasoning, undertaking to make it appear that it is different, but such empty and unsupported conclusions are not sufficient to indicate that there are any new and different interests of the defendant Dorothea W. Huszagh than those involved in the previous litigation. Plaintiff speaks of the interest of the family and the sister of the said Dorothea W. Huszagh, but they are not parties to the instant case. Plaintiff also asks for discovery in count three and four of the complaint,

[illegible]

but this adds nothing to change the subject matter of said counts. Plaintiff could, by discovery under our present practice, have obtained all the necessary facts for his complaint. He did receive an answer under oath by the defendants. In *Fisher v. Hargrave*, 318 Ill. App. 510, at p. 516, the Appellate Court said: " He undoubtedly hoped, by discovery, depositions and order of the court, to compel the production of 'necessary papers and documents in their (defendants') possession' to prove that the transactions conformed to his theory of a merger or consolidation and were otherwise than appear from the affidavits of Hargrave and Webster and the written agreement between the two partnerships which embodied 'all of the terms and conditions of the transactions'; and if he had availed himself of the provisions of the Civil Practice Act with respect to discovery (Ill. Rev. Stat. 1941, ch. 110, par. 182 (Jones Ill. Stats. Ann. 104.058) and of the rules of the Supreme Court prescribing the procedure under which discovery may be had (Ill. Rev. Stat. 1941, ch. 110, pars. 259.17, 259.19 (Jones Ill. Stats. Ann. 105.17, 105.19), he could have compelled the production of such documents as would be material to the issues involved, and he could have taken the depositions of the persons whose affidavits he was unable to procure, as he says, 'by reason of hostility.' But since he failed to pursue the remedies afforded him by statute, the trial court properly excluded from consideration the numerous speculative and conjectural allegations which plaintiff could not have sustained by his own testimony." The fourth count of the complaint does not set up a good cause of action, as the facts plainly show that the trustee

but this adds nothing to enhance the subject matter of the
concrete. Plaintiff could, by discovery, learn the names of the
firms, have obtained all the necessary facts for his complaint.
He did receive an answer under oath by the defendant, and
Plaintiff v. Defendant, 211 Ill. App. 2d 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

in bankruptcy is merely attempting to reach the interest of the said Dorothea W. Huszagh in the trust estate of her father. ✓

It clearly appears that the issues raised in the instant case have previously been adjudicated. Not only may they not properly gain further consideration herein, but plaintiff is barred from raising any other question that could have been considered in the case of Hummel v. Cardwell, supra. Appropriate is the language used by our Supreme Court in the case of Midlinsky v. Rubin, 341 Ill. 378 at page 386: "While an attempt to get relief by an inappropriate procedure or misconception of remedy will not deprive one of a remedy when he later seeks to recover by a proper bill alleging the facts, yet the doctrine of res judicata applies where there is identity of parties, of subject matter and of relief sought, and extends not only to questions actually decided but to all grounds of recovery which might have been presented in the first proceeding." All the additional grounds plaintiff attempted to set up in the instant case could have been asserted in the first bill of review except in count four. Count four as we have previously indicated is vulnerable to the motion to dismiss.

In Hummel v. Cardwell, supra, our Supreme Court held that the trial court correctly ruled that the bill of review filed by the trustee in bankruptcy be dismissed for want of equity. We can hardly appreciate any justification for this second bill of complaint. There can be no bill of review of a decision of the Supreme Court except possibly where a bill of review is brought upon newly discovered evidence, but in such cases the application for leave to file must be made to the court of chancery where the decree was originally

rendered. Schaefer v. Wunderle, 154 Ill. 577. This complaint is not brought within that rule. The circuit court of Lake County correctly dismissed the amended complaint for want of equity.

DECREE AFFIRMED.

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In The
APPELLATE COURT OF ILLINOIS
FOURTH DISTRICT
May Term, A. D. 1948

A 123

TERM NO. 48-M-10

AGENDA NO. 7

GEORGE MIDDENDORF,)	
	)	Appeal from the
Plaintiff-Appellant,)	
	)	County Court of
vs.)	
	)	St. Clair County.
HERMAN LOISEAU,)	
	)	C. C. Dreman, Judge.
Defendant-Appellee.)	

Scheineman, J.

335 I.A. 338

Automobiles owned by plaintiff and defendant were involved in a collision on July 6, 1947, at 2:30 P. M. in St. Clair County on Route 460 just east of the bridge which spans the Kaskaskia River, near Fayetteville. Plaintiff brought suit for damages to his automobile, defendant filed a counterclaim for damages to his car. The case was started in Justice Court, and was tried de novo in the County Court without a jury. Judgment was entered for defendant on his counterclaim in the sum of \$271.60 and plaintiff appeals.

No rulings of law are involved, the sufficiency and weight of the evidence being the only questions before this court.

At the site of the collision, the highway is paved with a concrete slab about 18 feet wide, which is on an embankment or fill approaching the bridge. On the north side of the highway, which runs east and west, there is a guard rail close to the pavement, leaving no shoulder. There is also a guard rail on the south side, but it is back farther from the pavement, leaving some shoulder. A few feet east of the bridge proper, there is

an opening in this south guard rail, permitting access to a dirt road which leads down off the fill to serve several club houses along the river. East of the intersecting road, the highway curves, but the distance from the dirt road, available for clear vision, is in dispute, one witness for defendant estimates it as low as 70 feet, another at 300 feet, while plaintiff's witnesses estimate it at from one to two and one-half blocks. Most of the argument in appellant's brief is based upon an assumed distance of 300 feet.

At the time of the collision, defendant's car was making a left turn onto the highway from the dirt road, while plaintiff's car was travelling in a westerly direction on the highway. The impact occurred about opposite the dirt road while defendant's car was still turning, being then on an angle and partly across the center line. Plaintiff's car struck defendant's near the front of the rear fender and sheared along the door and front fender, doing considerable damage to both cars.

Appellant's first contention is that the evidence fails to establish due care on the part of defendant's driver (who was the wife of the defendant and acting as his agent). It is fundamental that, whether conduct established by the evidence amounts to due care or is negligence, is normally a question for the jury. See the numerous cases cited in 25 Ill. D. Negligence, Sec. 136(2). In the absence of a jury, the question is submitted to the decision of the trial judge. *Fromme vs. City of Girard*, 295 Ill. App. 144; *Bird vs. Louer*, 272 Ill. App. 522.

In this case, evidence of due care is offered by defendant's driver as follows: that upon approaching the highway she came to a full stop, this is corroborated by other testimony and is not directly controverted; she further says that she looked in both directions and found the road clear; that she proceeded then to enter the highway at slow speed; that when her turn to the left was nearly completed, she was struck from the rear by the car whose approach had been unobserved by her. The impact was a hard blow which pushed her car clear over to the

left rail. There is some evidence that plaintiff's car approached at 40 to 45 M. P. H. Plaintiff's evidence is that his car was travelling at 35 to 40 M. P. H., that he did not slow down until within 20 or 30 feet of defendant's car because he did not see it until then.

The foregoing constitutes some evidence that defendant's car was operated with due care, and the collision was not that driver's fault. As against this, plaintiff relies upon the doctrine that a person will not be heard to say that she looked and did not see that which was in plain sight, and that it was therefore her duty to see plaintiff's car, and to avoid a collision with it.

This doctrine, which originated in railroad cases, has been applied to other vehicles, but it's application depends upon the circumstances. In this case, it may be true that plaintiff's car was travelling at a reasonable rate of speed for the open highway, but it is admitted that this speed was maintained around a curve and up to within 20 or 30 feet of defendant's car (less than two car-lengths). Obviously it would have travelled a considerable distance while defendant's car moved from a standing start slowly onto the highway and into a diagonal position. Under these circumstances, we are unable to assert as an inescapable conclusion that the approaching car must have been in the range of vision of defendant's driver at the last instant it was incumbent upon her to look to the right. It remained a question within the normal scope of a jury's judgment.

It is next asserted that there is not sufficient evidence of negligence on the part of plaintiff's driver to justify the adverse judgment. As above indicated, where the facts are shown, this is normally a question for the jury, or the trial judge sitting without a jury. Here there is evidence that the defendant's car had entered the highway in a lawful manner. Thereafter, the rights of the two drivers were reciprocal and equal. The law does not prohibit local traffic from using the highway. Once it is lawfully upon the highway, the through driver

must recognize the presence of the other car and use due care to avoid a collision. Upon perceiving a car in front of him, moving at slower speed than his own, plaintiff's driver has no right to ignore its presence, but must act accordingly.

There is evidence that the plaintiff's driver (who was the seventeen year old son of plaintiff and acting as his agent) may have failed to use such reasonable care in this: he came around a curve at a speed variously estimated between 35 and 45 M. P. H., then he made no attempt to slow down until within too short a distance to avoid colliding with the other car, on the highway in front of him in broad daylight. When within less than two car-lengths of the other car, he applied his brakes for the first time, and at the same time tried to pass it on the right where there was no shoulder, and not sufficient room between the guard rail and the other car. This is not only in the evidence, but most of it is admitted. And it is insisted by plaintiff's witnesses that there was a straight road for not less than one and perhaps two and one-half blocks between the curve and the dirt road.

Now it is plaintiff's driver and his passenger who assert that they "did not see" the other car until almost upon it. Whether, by proper attention to the road, they should have seen it, is a factual question for the trier of facts, and as in the case of the other car, we cannot declare there is one inescapable conclusion.

To explain how he could properly maintain his cruising speed until almost upon the other car, and not see it until too late to avoid a collision, plaintiff's driver says that defendant's car "shot out" onto the highway right in front of him. The defendant's car had to make the approach through the opening in one guard rail, and turn to the left in front of the opposite guard rail almost at the pavement's edge, and proceed onto a two-lane bridge a few feet away. To do this at a speed justifying plaintiff's description of it would be a rather difficult

maneuver. Moreover, five witnesses corroborate defendant's driver that she stopped at the edge of the highway, and she and her passenger testify to proceeding at slow speed. In view of this, we are unable to say the trial judge would be acting contrary to the weight of the evidence, if he chose to disbelieve plaintiff's explanations, and upheld defendant's theory of the case.

It is our conclusion that the questions in this case were purely factual, that there is substantial evidence to support the findings of the court below, and that there is no basis for us to find the conclusions are against the weight of the evidence. No point has been made of the amount of damages. Accordingly the judgment is affirmed.

Judgment Affirmed.

Presiding Justice Culbertson and

Justice Bardens Concur.

(Not to be published in full,
publish abstract only)

FILED

SEP 24 1948

Stanley B. Brown

CLERK OF THE APPELLATE COURT
FOURTH DISTRICT OF ILLINOIS

STATE OF ILLINOIS
APPELLATE COURT
FOURTH DISTRICT

May Term, A. D. 1948

TERM NO. 48-M-8

AGENDA NO. 6

Mildred Anna Wilmoth, Adminis-
tratrix of the Estate of Earl
Edwin Wilmoth, deceased,

Plaintiff-Appellant,

-vs-

William G. Clutts,

Defendant-Appellee,

and

Lloyd O. Clutts and Retta Clutts,

Defendants (Not Appellees)

)
)
) Appeal from the
) Circuit Court of
) Alexander County,
) Illinois.

335 I.A. 339

BARDENS, J.

Suit was brought in the circuit court of Alexander County, Illinois by Mildred Anna Wilmoth, as administratrix of the estate of Earl Edwin Wilmoth (hereinafter referred to as appellant) against William G. Clutts, Lloyd O. Clutts and Retta Clutts to recover damages on account of the death of Appellant's intestate resulting from injuries sustained by him while riding as a guest passenger in an automobile driven by William G. Clutts (hereinafter referred to as appellee). No demand for jury was filed by either party and the case was tried before the court, without a jury. At the close of appellant's evidence appellee entered his motion for a directed verdict as to both counts I and II of the complaint; whereupon appellant dismissed count I and the court denied the motion as to count II. Count II named only William G. Clutts as defendant. At the conclusion of the trial the court entered an order finding the issues for appellee under count II, and rendered judgment in his favor and against appellant for costs. From that judgment appellant

appeals and brings the case to this court seeking a reversal thereof and remandment of the cause for a new trial or, in the alternative, that the circuit court be ordered to enter judgment in favor of the appellant.

From the evidence it appears that appellant's intestate and one David Rothrock, both aged about seventeen years, were invited and accepted an invitation by appellee, a boy of about the same age, to ride with him from McClure, Illinois to Thebes, Illinois. The trip was begun with Rothrock seated in the front seat next to the driver (appellee) and appellant's intestate also in the front seat, to the right of Rothrock and next to the door of the automobile. In going from McClure to Thebes the car followed State Highway Route No. 3 to the outskirts of Thebes. From Route 3 a road runs into Thebes and joins Route 3 with a "Y" junction. In turning off Route 3 onto the road leading into Thebes a car follows a curve to the right and down one hill and up another. In coming up the second hill appellee's car ran off the pavement, across a shoulder; across the converging road of the "Y" and into a ditch. Appellant's intestate fell out of the car door and the car came to rest on him, thus causing the injuries resulting in death.

Count II of the complaint charges that defendant willfully and wantonly propelled the automobile at such a high rate of speed as to exhibit an entire absence of care and that the defendant knew, or should have known, that the probable result of his conduct would be to inflict fatal injuries on appellant's intestate. Appellant, in addition to introducing photographs of the above mentioned "Y" junction and scene of the accident produced the other guest passenger, namely, David Rothrock, as well as appellee, to prove the circumstances surrounding the accident. Rothrock was the only witness that testified as to speed.



It would be impossible to determine from the circumstances of the accident and the photographs whether appellee was guilty of willful and wanton negligence, as charged; therefore the lower court was compelled to weigh the evidence of Rothrock to make its determination of the ultimate facts. An examination of Rothrock's testimony reflects conflicting and self-contradictory statements. He finally said he did not know what was the speed of the car. He was shown to have any reliable basis for forming a judgment of speed, and there was impeachment evidence against him. It is our opinion, therefore, that the trial judge, as the trier of fact, was fully warranted in his finding, and that such finding was not against the manifest weight of the evidence.

Appellant complains of the admission of testimony that the deceased did not offer any objection or remonstrance to the manner in which Clutts drove. We do not think this ruling was erroneous, nor was appellant prejudiced thereby. This evidence was brought out on cross examination of appellant's witness, Rothrock, for the purpose of supporting appellee's claim that appellant was estopped from contending that the conduct of appellee was willful and wanton because appellant's intestate made no objection or remonstrance and therefore acquiesced in appellee's conduct. The evidence of Rothrock in this regard was not contradicted, and appellee's claim of estoppel was specifically raised in his motion for judgment and the motion was over-ruled by the court; thus the court did not rely upon this particular evidence to decide the issues.

Appellant further complains of and assigns as error the exclusion by the trial court of evidence with reference to experiments and tests made at the scene of the

accident. The car involved in the accident was a 1939 Studebaker; the tests were made with a 1947 Road Master Buick, which had traveled approximately 2200 miles. The cars were of different age, make, design, weight and horsepower. There was not shown sufficient similarity in the vehicles to assure any reasonable degree of probative value for the experiments or tests. The trial court did not err in the exclusion of this proffered testimony.

Lastly, appellant contends that the motion for judgment made by appellee at the close of appellant's evidence amounted to a submission of the entire case on the merits, and having over-ruled this motion it was error to later find for appellee. It is our view that the minutes of the court, as contained in the final order entered in this cause on October 21, 1947, indicate that the court treated said motion as a demurrer to the evidence and raising a question of law, only, and not as a submission of the case on its merits. The minutes of the court, above referred to, are as follows: " x x x The defendant moved for a directed verdict as to both counts I and II, and plaintiff confesses motion as to count I, and the court denies motion as to count II. Defendant introduces evidence and the court, after hearing all the evidence and being fully advised in the premises, finds the issues in favor of the defendants as to count II, and against the plaintiff. x x x ".

It is our conclusion that the judgment of the lower court be, and the same is hereby affirmed.

Affirmed.

Culbertson, P.J. and
Scheineman, J. concur.

(Publish in Abstract form, only)

FILED

SEP 29 1948

Stanley B. Brown

CLERK OF THE APPELLATE COURT
FOURTH DISTRICT OF ILLINOIS

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Abstract

Gen. No. 10224.

Agenda No. 1.

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT.
FEBRUARY TERM, A. D. 1948.

SHELL OIL COMPANY, a corporation,)
Plaintiff (Appellee),)
vs.)
VALENTINE TRANSFER & STORAGE)
COMPANY, a corporation,)
Defendant (Appellant).)

335 I.A. 339²

Appeal from
Circuit Court,
Kane County.

WOLFE,-- P. J.

This suit is the outcome of a collision between a truck of the Shell Oil Company, the plaintiff, and the truck of the defendant, Valentine Transfer and Storage Company. The Shell Oil Company filed its suit in the Circuit Court of Kane County, alleging that its truck was damaged because of the negligence of the defendant, Valentine Transfer and Storage Company. The Storage Company filed a cross complaint alleging that their truck was damaged through the negligence of the Shell Oil Company. The case was submitted to a jury who found the issues in favor of the plaintiff, and against the defendant in the original suit, and in favor of the Shell Oil Company on the cross complaint. Judgment was rendered in favor of the plaintiff in the sum of \$1,662.63.

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This bill is the subject of a legislative measure...

of the small oil company, the defendant, and the plaintiff...

defendant, Valentinus Thacker and George Company, the small oil...

Company filed a suit in the Circuit Court at San Diego, alleging...

that the truck was damaged because of the negligence of the defendant...

Valentinus Thacker and George Company. The plaintiff Company filed...

a cross complaint alleging that their truck was damaged because of...

negligence of the small oil company. The case was submitted to a...

jury who found the fault in favor of the plaintiff, and against...

the defendant in the original suit, and in favor of the small oil...

company on the cross complaint. Judgment was rendered in favor of...

the plaintiff in the sum of \$10,000.

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The plaintiff's driver was driving its truck, which consisted of a tractor and tank trailer loaded with thirteen and one-half tons of gasoline, east on 159th Street, close to an intersection of what is commonly called Wolf Road in Kane County, Illinois. The trucks collided a little east of the intersection, and the drivers of the trucks were the only eyewitnesses to the collision.

Mr. Shelvin, the driver of the Transfer Company, testified that he had stopped at a gasoline station at the southeast corner of the intersection, and that he turned left into 159th Street at about forty feet east of the intersection; that the Shell truck was coming down a slight grade on 159th Street, and the collision occurred. Each driver claimed that it was the fault of the other. The case was submitted to a jury under proper instructions, and it was their province to decide whose version of how the accident occurred, was more worthy of belief. After examining the evidence, we cannot say that the verdict of the jury was contrary to the manifest weight of the evidence.

At the trial, the plaintiff introduced what is termed Exhibit No. 1, which is a statement by the Manager of the Mac International Motor Truck Corporation of the repairs and price which were necessary to repair the plaintiff's truck, caused by the collision with the defendant's truck. Objection was made to the introduction of this exhibit, which was taken under advisement by the trial Court. Later, plaintiff's Exhibits No. 2, 3 and 4 were offered in evidence, which show in detail, the work which was done by the Motor Truck Corporation in repairing plaintiff's

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truck. Plaintiff's Exhibits No. 1, 2, 3 and 4 were again offered in evidence, and out of the presence of the jury, there was a discussion between all attorneys, and the Court, as to the admissibility of these exhibits. The objection made by the defendant to these exhibits was: "I am going to object to a lot of this. He does not know about this and does not know about that. I still don't know whether this damage was caused by this accident." The Court announced that Plaintiff's Exhibits No. 1, 2, 3 and 4 should be admitted in evidence. The defense then says: "We object to the ruling."

We think all of the exhibits were properly admitted. Mr. Miller, the serviceman for the Mac Truck Company, and who prepared Plaintiff's Exhibit No. 1, testified: "We did not do a complete overhauling. We did a complete repair job according to the wreck. We didn't overhaul the motor, transmission and stuff like that, unless it was damaged by the wreck." If defendant's objection meant that Exhibit No. 1 was not specific enough, certainly Plaintiff's Exhibits No. 2, 3 and 4 cured any defect that might have existed in Exhibit No. 1.

It is our conclusion that the evidence in this case supports the verdict of the jury, and the judgment of the trial court should be affirmed.

Judgment affirmed.

From the first of these it is clear that the

in relation, and not of the movement of the body, there is a

distinction between the stationary and the moving, as is also

the case of the stationary. The object of the stationary is

to be at rest, and the object of the moving is to be in

motion. This is the first of the two principles of the

distinction, and it is the first of the two principles of the

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In October 1946, John G. Allen filed a suit in the Circuit Court of Winnebago County, against Charles D. Beam for damages he alleged to have suffered by reason of the willful and wanton manner in which Beam drove and operated his car at the time of the collision with the bus. The complaint alleges that at the time and place aforesaid, Charles D. Beam willfully,

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Form No. 100

STATE OF ILLINOIS

IN PROBATE COURT

WILL OF JAMES A. JONES

38-10-100

James A. Jones
deceased

JOHN A. JONES
Plaintiff

vs.

CHARLES A. JONES
Defendant

WITNESSES: P. J.

In Jan. 1914, John A. Jones was killed in a collision
between a car owned by Charles A. Jones and a car owned
by John A. Jones. The car owned by John A. Jones was
driving on a public highway in the City of Rockford,
Illinois, and was traveling in a southerly direction
when it collided with a car owned by Charles A. Jones
which was traveling in a northerly direction. The car
owned by John A. Jones was damaged and the driver
was injured. The car owned by Charles A. Jones was
also damaged and the driver was injured.

In October 1914, John A. Jones filed a bill in the
Circuit Court of Winnebago County, Illinois, against
Charles A. Jones for damages. The bill alleged that
Charles A. Jones was negligent in driving his car at the
time of the collision with the car owned by John A. Jones
and that Charles A. Jones was liable for the damages
suffered by John A. Jones.

2.

wantonly and maliciously drove his automobile in a generally southern direction on the easterly side of said 7th Street on that portion ordinarily used for northbound traffic at a high and excessive rate of speed, in attempting to pass automobiles travelling in a generally southern direction on 7th Street, on the west side of 7th Street, so that he collided with an automobile owned and operated by the Central Illinois Electric and Gas Company, and then and there being under the control and management of one, Robert L. Anderson.

He also charged that the defendant willfully, wantonly and maliciously ran, managed, operated, controlled and propelled a motor vehicle driven by him, so that he collided with another motor vehicle; that the defendant willfully, wantonly and maliciously operated his automobile without keeping a proper lookout, so that his automobile collided with another motor vehicle; that the defendant willfully, wantonly and maliciously operated and controlled his car at a high and excessive rate of speed; that the defendant willfully, wantonly and maliciously drove, operated and controlled his automobile on the east side of the highway, being then and there used by traffic proceeding in the opposite direction, so that he collided with another vehicle; that the defendant willfully, wantonly and maliciously drove, managed, controlled and operated his automobile with the windshield of his automobile clouded so that he could not keep a proper lookout.

The plaintiff claims in his complaint that he was free from any willful and wanton misconduct that contributed in any manner to his injury, and that as a direct and proximate result of the willful,

went on and on, and the car was driven in a generally
southern direction on the east side of said 7th Street, and
that portion of the road for northward travel at a high
and excessive rate of speed, in attempting to pass automobiles
traveling in a generally southerly direction on 7th Street, and
the west side of 7th Street, so that he collided with an auto-
mobile owned and operated by the Central Illinois Electric and
Gas Company, was then and there being under the control and manage-
ment of one, Robert L. Johnson.

It is also charged that the defendant, WILLIAM, was driving an
automobile, owned, operated, controlled and managed by one
vehicle driven by him, so that he collided with another motor vehicle;
that the defendant, WILLIAM, was driving and operating an
automobile without keeping a proper lookout, so that his automobile
collided with another motor vehicle, that the defendant, WILLIAM,
was driving and operating an automobile at a high
and excessive rate of speed, that the defendant, WILLIAM, was driv-
ing and maliciously drove, operated and controlled an automobile
on the east side of the highway, being then and there used by
traffic proceeding in the opposite direction, so that he collided
with another vehicle; that the defendant, WILLIAM, was driving and
maliciously drove, operated, controlled and operated his automobile
with the intention of colliding with another automobile, so that he could not
keep a proper lookout.

The plaintiff claims in his complaint that he has been injured
by WILLIAM and another defendant that contributed in any manner to
his injury, and that as a direct and proximate result of the collision,

3.

wanton and malicious operation of the defendant's automobile, the plaintiff was severely injured and damaged.

The defendant filed his answer and denied all acts of willful and wanton misconduct on his part that in any way contributed to the injury of the plaintiff. The defendant filed an amendment to his answer in which he charged that if he was guilty of any willful and wanton misconduct, that caused any injury to the plaintiff, the plaintiff himself was guilty of willful and wanton misconduct, which was a contributing cause to the accident and result in injury to the plaintiff.

The case was submitted to a jury and they found the issues in favor of the plaintiff and assessed his damages at \$10,000.00. The defendant entered a motion for a new trial, which was denied. Judgment was entered on the verdict in favor of the plaintiff for \$10,000.00, and this appeal follows.

It appears from the evidence that John G. Allen got into the car of Charles D. Beam while Mr. Beam was on his way home; that they stopped at the Martin Oil Company for gasoline, and at that time it was cold and the windshield had frosted over. As they started to leave the filling station, Mr. Allen told Mr. Beam that they should wipe the windshield, as it was frosty, and he could not see. Allen proceeded to clear the windshield, but Mr. Beam started and drove on, and the collision occurred. Neither Mr. Allen nor Mr. Beam could tell a coherent story, as to just how the accident happened, as they were both rendered unconscious by the accident.

Robert L. Anderson was called as a witness for the plaintiff,

wagon and collision operation of the defendant's automobile,

the plaintiff was severely injured and damaged.

The defendant filed his answer and denied all items of

damages and various misstatements in his part to any way

attributed to the injury of the plaintiff. The defendant filed an

affirmation to his answer in which he stated that he was guilty

of any willful and intentional misstatements, that caused any injury to

the plaintiff, was admitted himself was guilty of willful and

various misstatements, which was a contradictory cause to his statement

and results in injury to the plaintiff.

The case was submitted to a jury and they found the issues

in favor of the plaintiff and awarded the damages of \$10,000.00.

The defendant appealed to the court for a new trial, which was denied.

Thereafter was entered on the verdict in favor of the plaintiff

for \$10,000.00, and this appeal follows.

It appears from the evidence that John J. Allen, for the

the car of Charles J. Allen while Mr. Allen was on his way home;

that they stopped at the Martin Oil Company for gasoline, and

at that time it was cold and the windshield and doors were

so they wanted to leave the filling station, Mr. Allen told

Mr. Allen that they should wipe the windshield, as it was foggy,

and he failed to do so. Allen proceeded to clean the windshield,

and Mr. Allen started and drove on, and the collision occurred.

Neither Mr. Allen nor Mr. Allen could tell a coherent story, as to

just how the accident happened, as they were both rendered un-

conscious by the accident.

Robert L. Anderson was called as a witness for the plaintiff.

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and stated that he was the driver of the bus with which Mr. Beam's car collided, and the plaintiff injured. He stated that it was quite cool and nearer to freezing than zero; that he had defrosters on the bus which he was driving, and his vision was clear; that he had the accident nearly in front of the Martin Oil Station; that he saw the car of the defendant approaching a block and a half away, and that the defendant came out of his line of traffic to pass other cars that were going in a southerly direction. He testified: "This car came out of the line of traffic and started passing all of them, and at first I didn't pay any attention because I thought it was just another car passing, but that when we got near I put my foot on the brake getting prepared in case he didn't get back there and then I hit the brake,-- I realized how fast he was coming and the next thing I knew we hit. The collision took place directly in front of the Martin Oil Station on my side of 7th Street when the bus was about four feet from the east curb line. I believe I am able to judge the speed of approaching automobiles, and I believe the car was going forty miles an hour. I believe my bus was going twenty to twenty-five miles an hour, as I approached the oil station." Mr. Anderson further testified that he slowed down just before the accident occurred, and he did not think his bus was travelling more than from ten to fifteen miles an hour, probably nearer ten miles an hour; that he had two headlights, and a light for a sign and marker lights burning at the time of the collision.

Everett E. Collins, another bus driver, was called as a witness who testified that he was following the bus, driven by Mr. Anderson, on the night of the accident, and saw the defendant's

and stated that he was the driver of the car which Mr. Bessie
can collect, and the accident occurred. He stated that it was
quite dark and raining at the time, and that he had no lights
on the car which he was driving, and that when he saw the
other car he was nearly in front of it, and that he was
he saw the car of the defendant approaching a block and a half
away, and that the defendant came out of the line of traffic
and other cars that were going in a southerly direction. He
testified: "This car came out of the line of traffic and was
passing all of them, and as I was I did not pay any attention to
it. I thought it was just another car passing, and that when
we got near it it got out of the line of traffic and was in
the line of traffic and then I saw the car, and I realized
how fast he was coming and the point being I knew we hit. The
collision took place directly in front of the car of the
other side of the street where the car was coming from, and
the car was hit. I believe I was able to judge the speed of
approaching the car, and I believe the car was going
faster than I believe it was going before it was hit. I believe
it was hit, as I approached the car. The collision
further testified that he showed that before the accident
occurred, and he did not think the car was traveling more than
from ten to fifteen miles an hour, probably nearer ten miles an
hour; that he had two headlights, and a light for a sign and
another light burning at the time of the collision.
However, Collins, another law officer, was called as a
witness who testified that he was following the car, driven by
Mr. Amerson, on the night of the accident, and saw the defendant's

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car approaching the bus on the wrong side of the street; that in his opinion, the defendant's car was being driven at about forty miles per hour.

Charles D. Beam was called as a witness on his own behalf, and stated that they had gone to the filling station to get gas and that the weather was cold, and they went inside of the building at the gas station; that they came out and the windshield was steamed up, and started to frost over; that he told Allen to get the scraper out of the glove compartment, which he did, and scraped a place eight by ten or twelve inches on the driver's side, and Allen was scraping his side of the windshield, as they left the station. He denied that Allen told him not to drive out until the windows had been entirely scraped. He said that he did not remember anything about what happened, how the accident occurred, or anything about it. The defense called no other witnesses to testify.

It is first insisted that there was not sufficient proof to take the case to the jury on the issue of willful and wanton misconduct on the part of the defendant. This question presented an issue of fact to be decided by the jury under proper instructions. (Bernier vs. Illinois Central Railroad Company, 296 Ill. 464 and Schneiderman vs. Interstate Tr. Lines, 394 Ill. 583.) After a review of the evidence, it is our conclusion that it fully sustains the findings of the jury on this issue, and we think the evidence sustains the contention of the appellee that he was not guilty of any willful and wanton misconduct on his part, which contributed to the accident in question.

It is clear that there was not sufficient proof to take the case to the jury on the issue of willful and malicious misconduct on the part of the defendant. This question presented an issue of fact to be decided by the jury under proper instructions (Berkovitz vs. Illinois Central Railroad Company, 200 Ill. 484 and Commonwealth vs. Interstate Dr. Lines, 204 Ill. 383.) After a review of the evidence, it is our conclusion that it fully sustains the findings of the jury on this issue, and we think the evidence sustains the contention of the appellee that he was not guilty of any willful and malicious misconduct on his part, which contributed to the accident in question.

6.

It is urged that the trial court erroneously instructed the jury as to the definition of willful and wanton misconduct. We have examined each of these instructions, and it is our conclusion that they fairly state the law relative to willful and wanton misconduct. Such instructions have been approved by both our Appellate and Supreme Courts. In the case of *Schneiderman vs. Interstate Tr. Lines*, supra, the Court states the law relative to willful and wanton misconduct. The two instructions here criticized, correctly state the law.

Complaint is made in regard to plaintiff's instruction No. 9, which the Court interlined and added several words. The instruction is relative to the burden of proof of the willful and wanton misconduct of the plaintiff, and in one place instead of using the words 'willful and wanton,' the Court uses 'willful or wanton.' It is not pointed out by the appellant wherein the substance of the instruction is erroneous, but claims it is reversible error to give such an instruction as the Guest Act under which this case is brought, uses the words 'willful and wanton,' misconduct etc. This question has been decided adversely to the contention of the appellant in the case of *Walldren Express Co., vs. Krug*, 291 Ill. Page 478, where we find this language: "The declaration does not use the word "willful," and the plaintiff in error insists that the charge that the defendant "carelessly and recklessly and wantonly ran said automobile upon and against the plaintiff" is simply a charge of ordinary negligence and not of willful conduct. In the cases which have been heretofore cited, and others, and in text books, the words "wanton," "wantonly"

It is urged that the trial court erroneously instructed the jury as to the definition of willful and action misconduct. We have examined each of these instructions, and in its own opinion find that they fairly state the law relative to willful and action misconduct. When instructions have been approved by both our Appellate and Supreme Courts. In the case of Commonwealth vs. Interstate St. Lines, where the Court states the law relative to willful and action misconduct, and the instructions were criticized, correctly state the law.

Complaint is made in regard to Plaintiff's instruction No. 2, which the Court instructed and added several words. The instruction is relative to the burden of proof in the willful and action misconduct of the plaintiff, and in one place omitted using the words "willful and action". The Court was holding on "action". It is not pointed out by the appellant wherein the substance of the instruction is erroneous, but it is in veritable error to give such an instruction as the Court has under which this case is brought, where the words "willful and action" misconduct are. This question has been decided adversely to the defendant in the case of Commonwealth vs. Interstate St. Lines, 201 Ill. 2d 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

7.

and "wantonness," "willful," "willfully" and "willfulness," have been used to express the same thing. Sometimes the expression has been "wanton and willful," sometimes "wanton or willful," sometimes "wanton" and sometimes "willful," but whenever an effort has been made to explain the meaning of the expressions used, it is apparent that all are used to express the same general idea."

It is claimed the Court erred in altering an instruction tendered by the defendant, and in giving the instruction as altered, so as to emphasize to the jury that the plaintiff could recover for ordinary negligence. We think that what the Court added to this instruction was proper, as it fairly states the law. We do not see how the jury could possibly believe that the plaintiff could recover for the ordinary negligence of the defendant in his operation of his automobile that caused the injury to the plaintiff.

It is our conclusion that the defendant had a fair and impartial trial, and the judgment appealed from should be affirmed.

Judgment affirmed.

and "admission," "admission," and "admission," have
been used to express the same thing. Sometimes the expression
has been "admission and admission," sometimes "admission and admission,"
sometimes "admission and admission," and sometimes "admission and admission."
The effort has been made to explain the meaning of the expression
used, it is apparent that it has been used to express the same thing
as the word "admission."

It is claimed that the Court error in allowing an instruction
rendered by the defendant, and in giving the instruction as stated,
so as to confuse the jury that the defendant could recover for
ordinary negligence. We think that what the Court added to this
instruction was incorrect, as it fairly states the law. We do not
see how the jury could possibly believe that the defendant could
recover for the ordinary negligence of the defendant in the operation
of his automobile that caused the injury to the plaintiff.
It is our conviction that the defendant had a fair trial.
The trial, and the judgment rendered thereon should be affirmed.

Respectfully,
J. Edgar Hoover

Abstract

Gen. No. 10241

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT.

February Term, A. D. 1948

IDA K. ROBINSON, Administrator De
Bonis Non With the Will Annexed
of the Estate of Laura P. Robin-
son, Deceased,

Petitioner-Appellant,

vs

WILLIAM A. DENNIS, an Officer or
Agent of The Third National Bank
of Rockford, Illinois,

Respondent-Appellee.

Appeal from the
Circuit Court of
Winnebago County

335 I.A. 340²

Bristow, J.

The appellant herein filed her petition in the Probate Court of Winnebago County alleging that Laura P. Robinson died testate in 1878; that her will was admitted to probate by that court on November 4, 1878; that listed among the assets of the estate were certain shares of stock of the Third National Bank of Rockford, Illinois; that the estate was closed on March 15, 1900; that the estate was closed upon the petition of Henry H. Robinson, Executor and Laurance P. Robinson, the son of Henry H. Robinson, between whom there was allegedly a confidential relationship; and that Laurance P. Robinson, as a result of having been imposed upon, was prevailed upon to sign certain petitions and receipts which resulted in the closing of the estate in question. It was further alleged in the petition that Laurance P. Robinson was led to believe at the time of the signing of the papers that he was

IN THE

Gen. No. 10841

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT.

February Term, A. D. 1948

Appeal from the
Circuit Court of
Winnebago County

IDA K. ROBINSON, Administrator of
Estate of Lawrence P. Robinson,
Deceased,

Petitioner-Appellant,

vs

WILLIAM A. DENNIS, an Officer of
the Third National Bank
of Rockford, Illinois,

Respondent-Appellee.

Bristol, J.

The appellant herein filed her petition in the
Probate Court of Winnebago County alleging that Lawrence P.
Robinson died testate in 1878; that her will was admitted to
probate by that court on November 4, 1878; that listed among
the assets of the estate were certain shares of stock of the
Third National Bank of Rockford, Illinois; that the estate
was closed on March 15, 1900; that the estate was closed upon
the petition of Henry H. Robinson, Executor and Laurence P.
Robinson, the son of Henry H. Robinson, between whom there was
allegedly a confidential relationship; and that Laurence P.
Robinson, as a result of having been imposed upon, was prevail-
ed upon to sign certain petitions and receipts which resulted
in the closing of the estate in question. It was further al-
leged in the petition that Laurence P. Robinson was led to be-
lieve at the time of the signing of the papers that he was

simply signing an authorization for the extension of time for the closing of the estate for five years, and that Laurance never received any of the assets. It was further indicated in the petition that Henry H. Robinson had listed fifteen shares of stock in the Third National Bank of Rockford, Illinois, and that no part of that stock was ever delivered to Laurance. The petition seeks to ascertain its whereabouts or disposition.

A motion to dismiss this petition was filed in the Probate Court and was denied. But upon appeal to the Circuit Court, such a motion was allowed, and this appeal resulted.

In the petition, reference was made to the files of the estate which disclose the following additional facts: Henry H. Robinson, the named Executor and Trustee, listed in his inventory "Bank Stock of 3rd Nat. Good \$1000.00." In a report filed in the County Court in this estate on the 27th day of November, 1880, the Executor charged himself with "principal and interest which had accrued to death of decedent on notes and 10 shares of bank stock as per Inventory 20812.80." On March 15, 1900, Henry H. Robinson filed in that court in the matter of the estate of said decedent his petition for discharge as executor, and there was filed the Receipt and Petition of Laurance P. Robinson which contained the following language: "That he was 21 years old on October 19th, 1899; That since becoming of age he had demanded and received of his father and Executor one-half of the principal of the estate of Laura P. Robinson in accordance with his rights under the will and that it had been paid, delivered and conveyed to him; That a detailed and complete account of his acts and doings had been rendered by the said Henry H. Robinson so far as the same affected the rights of Laurance P. Robinson and he was satisfied therewith: That he petitioned the court to discharge the Executor and that the estate be closed." This petition and receipt were under oath,

simply signing an authorization for the expiration of time for
the closing of the estate for five years, and that Lawrence
never received any of the assets. It was further indicated
in the petition that Henry H. Robinson had listed fifteen shares
of stock in the Third National Bank of Rockford, Illinois, and
that no part of that stock was ever delivered to Lawrence. The
petition seeks to ascertain the whereabouts of the assets.
A motion to dismiss this petition was filed in the
Probate Court and was denied. But upon appeal to the Circuit
Court, such a motion was allowed, and this appeal resulted.
In the petition, reference was made to the filing
of the estate which discloses the following additional facts:
Henry H. Robinson, the named executor and trustee, listed in
his inventory "Bank stock of 3rd Nat. Bank of Rockford, Ill. Good \$1000.00." In
a report filed in the County Court in this estate on the 12th
day of November, 1890, the executor charged himself with "prin-
cipal and interest which had accrued to said estate of \$1000.00."
On March 12, 1900, Henry H. Robinson filed in that court in
the matter of the estate of said deceased his petition for dis-
charge as executor, and there was filed the Petition and Petition
of Lawrence P. Robinson which contained the following language:
"That he was 21 years old on October 19th, 1869; that since be-
coming of age he had demanded and received of his father and
executor one-half of the principal of the estate of Lawrence P.
Robinson in accordance with his rights under the will and that
it had been paid, delivered and conveyed to him; That a de-
tailed and complete account of his acts and doings had been ren-
dered by the said Henry H. Robinson as far as the same affected
the rights of Lawrence P. Robinson and he was satisfied therewith;
That he petitioned the court to discharge the executor and that
the estate be closed." This petition and receipt were under oath,

and pursuant thereto, Henry H. Robinson was discharged, and the estate was closed.

Forty-six years later appears the document which we have under consideration. In the meanwhile, however, Henry H. Robinson died in May, 1923, and later in that month Laurance P. Robinson entered his appearance, waived notice and consented to the probate of his father's will, and after more than a year, notice of final settlement having been given Laurance, this estate was closed.

Under the will of Laura P. Robinson, she gave, devised and bequeathed all of her property and estate to her husband, Henry H. Robinson, in trust. She provided that the trust estate should be held, controlled, used and managed by him during his natural life, except as she provided in the will for the support, maintenance and education of Laurance, the distribution to be made to him when he attained the age of 21 years and the contingency provided for in the event of his death. She gave her husband express power to sell her real estate and effects.

It occurs to this court that there are many reasons for the action of the circuit court in this matter. The record discloses that the estate of Laura P. Robinson was duly closed in 1900, and that in the files there appears a receipt of Laurance P. Robinson indicating that he had received all due him in the settlement of that estate. If some fraud had been practiced upon him, and he was required to sign something other than that which he intended to sign, he had recourse in a court of Equity to have the same set aside. If there was an improper administration of the trust created under his mother's will, he had recourse in a court of Equity to inquire into such irregularities. The Probate Court is not the proper tribunal to seek redress for such

Probate Court is not the proper tribunal to seek redress for such in a court of Equity to inquire into such irregularities. The tion of the trust created under his mother's will, he had recourse to have the same set aside. If there was an improper administration which he intended to sign, he had recourse in a court of Equity upon him, and he was required to sign something other than that the settlement of that estate. If some trust had been practiced since P. Robinson indicating that he had received all due him in in 1900, and that in the list there appeared a receipt of Laura disclosed that the estate of Laura P. Robinson was duly closed for the action of the circuit court in this matter. The record It occurs to this court that there are many reasons power to sell her real estate and effects. vided for in the event of his death. She gave her husband express him when he attained the age of 21 years and the contingency pro- tenance and education of Laurence, the disposition to be made to life, except as she provided in the will for the support, main- be held, controlled, used and managed by him during his natural H. Robinson, in trust. She provided that the trust estate should and bequeathed all of her property and estate to her husband, Henry Under the will of Laura P. Robinson, she gave, devised was closed. notice of final settlement having been given Laurence, this estate the probate of his father's will, and after more than a year, Robinson entered his appearance, waived notice and consented to Robinson died in May, 1923, and later in that month Laurence P. have under consideration. In the meanwhile, however, Henry H. Forty-six years later appears the document which we the estate was closed. and pursuant thereto, Henry H. Robinson was discharged, and

grievances. ~~Everything that appears in the files is inconsistent with the charges made in the petition under consideration.~~ His father lived ^{after his mother's estate was closed} for twenty-four years, yet no such action was taken by Laurance. Then it was more than twenty years after his father's estate was closed that the instant proceedings were brought. It is the theory of petitioner that she is entitled to the information sought by virtue of Chapter 3, Section 335, Illinois Revised Statutes which reads as follows: "Upon the filing of a verified petition therefore, the Probate Court shall order a citation to issue for the appearance before it of any person whom the petitioner believes * * * to have information or knowledge withheld by respondent from the executor, administrator, guardian or conservator, and needed by the executor, administrator, guardian or conservator for the recovery of any property, by suit or otherwise."

The files of the estate show where the property, which is the subject of petitioner's inquiry, went. Laurance stated under oath that he got his share in accordance with the provisions in his mother's will. It was sixty-nine years after the opening of the estate before a voice was raised challenging the integrity of Henry H. Robinson, the named Executor and Trustee of the estate. We are of the opinion that the doctrine of laches has its place in our thinking and determination that the judgment entered herein by the Circuit Court should be affirmed. The language used in 19 Amer. Jur., Sec. 492, p. 340, Note 20, is especially appropriate: "The defense itself is one which, wisely administered, is of great public utility, in that it prevents the breaking up of relations and situations long acquiesced in, and thus induces confidence in the stability of what is, and a willingness to improve property in possession; and at the same

grief needs. ~~Everything that appears in the files is inconsistent~~

with the charges made in the petition under consideration. His

father lived for twenty-four years, yet no such action was taken

by him. Then it was some twenty years after his father's

estate was closed that the instant proceedings were brought. It

is the theory of petitioner that she is entitled to the informa-

tion sought by virtue of Chapter 2, Section 385, Illinois Re-

vised Statutes which reads as follows: "Upon the filing of a

verified petition therefor, the Probate Court shall order a citi-

tion to issue for the appearance before it of any person whom

the petitioner believes to have information or knowledge

withheld by respondent from the executor, administrator, guard-

ian or conservator, and needed by the executor, administrator,

guardian or conservator for the recovery of any property, by suit

or otherwise."

The files of the estate show where the property,

which is the subject of petitioner's inquiry, went. Legacies

stated under oath that he got his share in accordance with the

provisions in his mother's will. It was sixty-nine years after

the opening of the estate before a voice was raised challenging

the integrity of Henry M. Robinson, the named executor and trustee

of the estate. We are of the opinion that the doctrine of laches

has its place in our thinking and determination that the judg-

ment entered herein by the Circuit Court should be affirmed. The

language used in 19 Amer. Jur., Sec. 492, p. 340, Note 30, is

especially appropriate: "The defense itself is one which, wisely

administered, is of great public utility, in that it prevents

the breaking up of relations and situations long acquiesced in,

and thus induces confidence in the stability of what is, and a

willingness to remove property in possession; and at the same

time it certainly works in furtherance of justice, for so strong is the desire of every man to have the full enjoyment of all that is his, that, when a party comes into court and asserts that he has been for many years the owner of certain rights, of whose existence he has had full knowledge and yet has never attempted to enforce them, there is a strong persuasion that, if all the facts were known, it would be found that his alleged rights either never existed, or had long since ceased."

JUDGMENT AFFIRMED.

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is the desire of every man to have the full enjoyment of all
that is his, that, when a party comes into court and asserts that
he has been for many years the owner of certain rights, of whose
existence he has had full knowledge and yet has never attempted
to enforce them, there is a strong presumption that, if all the
facts were known, it would be found that his alleged rights
either never existed, or had long since ceased.

JUSTICE TRIUMPHS.

No. 10280

Abstract

In the
APPELLATE COURT OF ILLINOIS
Second District
May Term, A. D. 1948

In the Matter of ROY SHARP, JR.,
RONALD SHARP, MARTHA SHARP, PEGGY
SHARP, and CORA SHARP, Alleged to
Be Dependent.

ROSETTA SHARP,

Petitioner, Appellee,

vs.

ROY SHARP, and FATHER PHILIP KENNEDY,
Superintendent of St. Vincent's
Home for Children at Freeport, Illi-
nois, and Guardian of the Persons of
Roy Sharp, Jr., Ronald Sharp, Martha
Sharp, Peggy Sharp, and Cora
Sharp, Minors,

Defendants, Appellants

Appeal from the
County Court of
Whiteside County.

Honorable
Walter J. Stevens
Judge Presiding.

335 I.A. 341

BRISTOW, J.

On September 5, 1946, Roy Sharp obtained a divorce from his wife Rosetta Sharp on the ground of adultery and was found fit and proper to have the custody of his five children, namely Roy Sharp, Jr., Ronald Sharp, Martha Sharp, Peggy Sharp and Cora Sharp, ranging in age from three to nine. The divorce action was uncontested.

On September 25, 1946, John Phelps filed a petition in the County Court of Whiteside County alleging that the Sharp children were dependent and that the father was unable to maintain a proper

Reported Proceed

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Deletions, administered

1. 2. 3. 4. 5. 6. 7. 8. 9. 10. 11. 12. 13. 14. 15. 16. 17. 18. 19. 20. 21. 22. 23. 24. 25. 26. 27. 28. 29. 30. 31. 32. 33. 34. 35. 36. 37. 38. 39. 40. 41. 42. 43. 44. 45. 46. 47. 48. 49. 50. 51. 52. 53. 54. 55. 56. 57. 58. 59. 60. 61. 62. 63. 64. 65. 66. 67. 68. 69. 70. 71. 72. 73. 74. 75. 76. 77. 78. 79. 80. 81. 82. 83. 84. 85. 86. 87. 88. 89. 90. 91. 92. 93. 94. 95. 96. 97. 98. 99. 100. 101. 102. 103. 104. 105. 106. 107. 108. 109. 110. 111. 112. 113. 114. 115. 116. 117. 118. 119. 120. 121. 122. 123. 124. 125. 126. 127. 128. 129. 130. 131. 132. 133. 134. 135. 136. 137. 138. 139. 140. 141. 142. 143. 144. 145. 146. 147. 148. 149. 150. 151. 152. 153. 154. 155. 156. 157. 158. 159. 160. 161. 162. 163. 164. 165. 166. 167. 168. 169. 170. 171. 172. 173. 174. 175. 176. 177. 178. 179. 180. 181. 182. 183. 184. 185. 186. 187. 188. 189. 190. 191. 192. 193. 194. 195. 196. 197. 198. 199. 200. 201. 202. 203. 204. 205. 206. 207. 208. 209. 210. 211. 212. 213. 214. 215. 216. 217. 218. 219. 220. 221. 222. 223. 224. 225. 226. 227. 228. 229. 230. 231. 232. 233. 234. 235. 236. 237. 238. 239. 240. 241. 242. 243. 244. 245. 246. 247. 248. 249. 250. 251. 252. 253. 254. 255. 256. 257. 258. 259. 260. 261. 262. 263. 264. 265. 266. 267. 268. 269. 270. 271. 272. 273. 274. 275. 276. 277. 278. 279. 280. 281. 282. 283. 284. 285. 286. 287. 288. 289. 290. 291. 292. 293. 294. 295. 296. 297. 298. 299. 300. 301. 302. 303. 304. 305. 306. 307. 308. 309. 310. 311. 312. 313. 314. 315. 316. 317. 318. 319. 320. 321. 322. 323. 324. 325. 326. 327. 328. 329. 330. 331. 332. 333. 334. 335. 336. 337. 338. 339. 340. 341. 342. 343. 344. 345. 346. 347. 348. 349. 350. 351. 352. 353. 354. 355. 356. 357. 358. 359. 360. 361. 362. 363. 364. 365. 366. 367. 368. 369. 370. 371. 372. 373. 374. 375. 376. 377. 378. 379. 380. 381. 382. 383. 384. 385. 386. 387. 388. 389. 390. 391. 392. 393. 394. 395. 396. 397. 398. 399. 400. 401. 402. 403. 404. 405. 406. 407. 408. 409. 410. 411. 412. 413. 414. 415. 416. 417. 418. 419. 420. 421. 422. 423. 424. 425. 426. 427. 428. 429. 430. 431. 432. 433. 434. 435. 436. 437. 438. 439. 440. 441. 442. 443. 444. 445. 446. 447. 448. 449. 450. 451. 452. 453. 454. 455. 456. 457. 458. 459. 460. 461. 462. 463. 464. 465. 466. 467. 468. 469. 470. 471. 472. 473. 474. 475. 476. 477. 478. 479. 480. 481. 482. 483. 484. 485. 486. 487. 488. 489. 490. 491. 492. 493. 494. 495. 496. 497. 498. 499. 500. 501. 502. 503. 504. 505. 506. 507. 508. 509. 510. 511. 512. 513. 514. 515. 516. 517. 518. 519. 520. 521. 522. 523. 524. 525. 526. 527. 528. 529. 530. 531. 532. 533. 534. 535. 536. 537. 538. 539. 540. 541. 542. 543. 544. 545. 546. 547. 548. 549. 550. 551. 552. 553. 554. 555. 556. 557. 558. 559. 560. 561. 562. 563. 564. 565. 566. 567. 568. 569. 570. 571. 572. 573. 574. 575. 576. 577. 578. 579. 580. 581. 582. 583. 584. 585. 586. 587. 588. 589. 590. 591. 592. 593. 594. 595. 596. 597. 598. 599. 600. 601. 602. 603. 604. 605. 606. 607. 608. 609. 610. 611. 612. 613. 614. 615. 616. 617. 618. 619. 620. 621. 622. 623. 624. 625. 626. 627. 628. 629. 630. 631. 632. 633. 634. 635. 636. 637. 638. 639. 640. 641. 642. 643. 644. 645. 646. 647. 648. 649. 650. 651. 652. 653. 654. 655. 656. 657. 658. 659. 660. 661. 662. 663. 664. 665. 666. 667. 668. 669. 670. 671. 672. 673. 674. 675. 676. 677. 678. 679. 680. 681. 682. 683. 684. 685. 686. 687. 688. 689. 690. 691. 692. 693. 694. 695. 696. 697. 698. 699. 700. 701. 702. 703. 704. 705. 706. 707. 708. 709. 710. 711. 712. 713. 714. 715. 716. 717. 718. 719. 720. 721. 722. 723. 724. 725. 726. 727. 728. 729. 730. 731. 732. 733. 734. 735. 736. 737. 738. 739. 740. 741. 742. 743. 744. 745. 746. 747. 748. 749. 750. 751. 752. 753. 754. 755. 756. 757. 758. 759. 760. 761. 762. 763. 764. 765. 766. 767. 768. 769. 770. 771. 772. 773. 774. 775. 776. 777. 778. 779. 780. 781. 782. 783. 784. 785. 786. 787. 788. 789. 790. 791. 792. 793. 794. 795. 796. 797. 798. 799. 800. 801. 802. 803. 804. 805. 806. 807. 808. 809. 810. 811. 812. 813. 814. 815. 816. 817. 818. 819. 820. 821. 822. 823. 824. 825. 826. 827. 828. 829. 830. 831. 832. 833. 834. 835. 836. 837. 838. 839. 840. 84

home for them. The father admitted his inability to properly care for them and joined in the prayer of the petition to have them placed in St. Vincent's Orphanage at Freeport, Illinois. Accordingly, they were placed in that institution and the superintendent of that home was appointed guardian over the persons of said children.

In January, 1948, Rosetta Sharp filed her petition in the County Court of Whiteside County stating that she had moved back to that county and that she desired to have the children removed from their present place of commitment to either the Whiteside County Home at Sterling, Illinois, or to the Mt. Carmel Orphanage at Morrison, Illinois. The basis for her request was that they would be more conveniently located where she could visit them more frequently. This petition was allowed and the children were placed under the guardianship of Anna Allen, who was directed to take the children to Mt. Carmel Orphanage. The father, Roy Sharp, and Father Philip Kennedy, Superintendent of St. Vincent's Home for Children, have appealed to this court.

Underlying this controversy seems to appear a divergence of religious views. It appears that prior to the divorce of the Sharps that they were protestants and that the children attended protestant places of worship, but that soon after the commitment of the children to a catholic home on January 3, 1947, the father became a member of the Catholic Church and had the children baptized as catholics soon thereafter. Now the mother re-appears and seeks to have them transferred to a protestant institution.

It appears indisputably that it was through no fault of the father that the commitment order became necessary. The mother had left her husband and five children for a life of immorality and did not contest the divorce action where she was charged with adultery and did not see fit to contest the right of her husband to have their sole custody. Just three weeks afterwards she did not see fit to challenge the propriety of the order declaring

them dependent, nor did she assert any objection to their being placed in a catholic institution. The father was a truck driver, and the duties of his employment necessitated his being away from home many nights. His mother, with whom he and his children lived, was eighty-five years of age. It was too much of a job for her to handle these five youngsters, so it was properly deemed to be in the best interest of the children and society generally that they be placed in a home. The father was ordered to pay forty dollars per month toward their support and made his payments regularly. Also he visited the children with marked regularity. The final orders in this case also provides that the mother pay twenty dollars per month, the father seventy dollars per month, and Whiteside County thirty dollars per month. Previously, the mother had paid nothing. The father now is taking no exceptions to the order for him to pay an additional sum.

There is no intimation that the children are not receiving the best of care at their present home, but the mother contended that if they were transferred to Mt. Carmel Orphanage they would be more accessible for frequent visits. The father's headquarters are at Joliet. Sterling is twenty miles closer to Joliet than Freeport, and the Mt. Carmel Home is eight miles north of Morrison and about twenty miles northwest of Sterling, so Mt. Carmel is about the same distance from Joliet as Freeport. Freeport is forty miles north of Sterling, consequently Mt. Carmel is twenty miles closer to Sterling. Neither Rosetta or Roy have a car, so they would be more or less dependent on bus transportation. There is none to Mt. Carmel. Both could reach Freeport by bus. Suffice it to say that after considering all of the evidence, there is a very serious question whether the mother's convenience is going to be greatly favored by the proposed change and there is no doubt but what the father is going to find it more difficult to visit the children if placed in the Mt. Carmel Home. But assuming that

then dependent, nor did she assert any objection to their being placed in a Catholic institution. The father was a truck driver, and the duties of his employment necessitated his being away from home many nights. His mother, with whom he and his children lived, was eighty-five years of age. It was too much of a job for her to handle these five youngsters, so it was properly desired to be in the best interest of the children and society generally that they be placed in a home. The father was ordered to pay fifty dollars per month to ward their support and make his payments regularly. Also he visited the children which varied regularly. The final orders in this case also provided that the mother pay twenty dollars per month, the father seventy dollars per month, and the state twenty dollars per month. Previously, the mother had paid nothing. The father now is making no exceptions to the order for him to pay an additional sum. There is no indication that the children are not receiving the best of care at their present home, but the mother contended that if they were transferred to St. Gabriel's Home, they would be more accessible for frequent visits. The father's headquarters are at Joliet. Sterling is twenty miles closer to Joliet than Freeport, and the St. Gabriel Home is eight miles north of Freeport and about twenty miles northwest of Sterling, at St. Gabriel is about the same distance from Joliet as Freeport. Freeport is forty miles north of Sterling, consequently St. Gabriel is twenty miles closer to Sterling. Neither Foster or Boy have a car, so they would be more or less dependent on bus transportation. There is none to St. Gabriel. Both could reach Freeport by bus. Suffice it to say that after considering all of the evidence, there is a very serious question whether the mother's convenience is going to be greatly favored by the proposed change and there is no doubt but what the father is going to find it more difficult to visit the children if placed in the St. Gabriel Home. But assuming that

the mother is slightly inconvenienced by having the children in their present location, does that justify an order changing their custody? We think not. Albeit Rosetta may be discommoded today, but who can tell where she will be tomorrow? At the time the original orders were entered herein pertaining to the placement of the children, Mrs. Sharp was absorbed in a clandestine romance that took her from Sterling to Lincoln, thence to Chicago and then back to Sterling. During this phase of her untrue life she did not care about the well-being of her boys and girls. Why should a court be extremely concerned about her wishes now or whether or not she may be slightly inconvenienced by the present arrangement. Who would dare predict any constancy in the whereabouts of any person with such a history of infidelity and indifference for her family.

We have considered the question raised by appellee that this Court has no jurisdiction to entertain this appeal; however, we have determined this contention to be without merit. The only principle of law that shares our attention in reaching what we think is the proper conclusion in this matter is found in Chapter 23, Paragraph 201, Illinois Revised Statutes, which reads as follows: "Any person interested in a child who has been found dependent may from time to time UPON A PROPER SHOWING, apply to the court for the appointment of a new guardian." It is the view of this Court that there was no proper showing of any necessity for a change in the guardianship or placement of the children involved herein. In fact, there was no showing at all and consequently, that part of the order transferring the guardianship of the children to Anna Allen is reversed and that part providing monthly payments to be made by mother, father, and Whiteside County is affirmed,

REVERSED IN PART, AFFIRMED IN PART.

As to amounts to be paid, except that said payments are to be made to St. Louis - instead of to Mrs. Allen's home.

the mother is slightly inconvenienced by leaving the children in
their present location, does that justify an order changing
their custody? We think not. Albert's location may be discontinued
today, but who can tell where she will be tomorrow? At the time
the original orders were entered herein pertaining to the place-
ment of the children, that there was a cloud hanging
over the fact that her first husband, to wit, John, had been in Chicago
and then back to Seattle. During this time of her unhappy life
she did not care about the well-being of her boys and girls. It
should be noted that she was extremely concerned about her children now or
whether or not she was in Seattle, inasmuch as the present
arrangement, who would have custody and control in the future
of any person with such a history of infidelity and indifference
for her family.

We have considered the question raised by Albert that some
court has no jurisdiction to overrule this order; however, we
have determined that this contention is without merit. The only
principle of law that bears our attention in reaching this
think is the proper conclusion in this matter is found in Chapter
65, Paragraph 201, Illinois Revised Statutes, which reads as follows:

"Any person interested in a child who has been found dependent
may from time to time upon a proper showing, apply to the court
for the appointment of a new guardian." It is the view of this
Court that there was no proper showing of any necessity for a
change in the guardianship or placement of the children involved
herein. In fact, there was no showing at all and consequently,
that part of the order transferring the guardianship of the children
to Anna Allen is reversed and that part providing jointly and
severally to be made by mother, father, and Matilda County is affirmed.

Abstract

A

Gen. No. 10247

Agenda No. 23

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

MAY TERM, A. D. 1948

SMITH OIL & REFINING CO.
an Illinois Corporation,
Plaintiff-Appellant

vs

CARL MONTGOMERY, ROBERT BOYER,
and WOLF CHEVROLET COMPANY,
an Illinois Corporation,
Defendants-Appellees

335 I.A. 342

APPEAL FROM THE
CIRCUIT COURT OF
BOONE COUNTY

Dove, J.

Kenneth Harlan Wright, an employee of, and while driving a truck belonging to, the Smith Oil and Refining Company, on May 15, 1946 was fatally injured. At that time the said Smith Oil and Refining Company was operating under the provisions of the Workmen's Compensation Act of this state and Wright was subject thereto. Thereafter the Industrial Commission entered an order to the effect that Alma M. Wright, widow of Kenneth Harlan Wright, was entitled to recover of the Smith Oil and Refining Company \$4800.00 as compensation under the provisions of said Act.

On March 18, 1947 the Smith Oil and Refining Company filed the instant suit against Carl Montgomery, Robert Boyer and Wolf Chevrolet Company. Its amended complaint

Exhibit No. 22

Exhibit No. 22

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

MAY TERM, A. D. 1949

388 A. 1588

APPEAL FROM THE
CIRCUIT COURT OF
COOK COUNTY

JOHN DILL & PETROLEUM CO.,
an Illinois corporation,
Plaintiff-Appellant

VS

DAVE MONTGOMERY, ROBERT MONTGOMERY,
and JOHN CHEVROLET COMPANY,
an Illinois corporation,
Defendants-Appellees

Dove, J.

Kenneth Harlan Wright, an employee of, and while
driving a truck belonging to, the said oil and refining
company, on May 15, 1949 was fatally injured. At that time
the said oil and refining company was operating
under the provisions of the Workmen's Compensation Act of
this State and Wright was subject thereto. Thereafter the
Industrial Commission entered an order to the effect that
Alice E. Wright, widow of Kenneth Harlan Wright, was entitled
to recovery of the said oil and refining company \$4800.00
as compensation under the provisions of said act.
On March 16, 1949 the said oil and refining company
filed the instant suit against Dave Montgomery, Robert
Montgomery and John Chevrolet Company. The amended complaint

alleged that Wright on May 15, 1946 was driving a truck to which a trailer, containing gasoline, was attached, in an easterly direction on Illinois State Highway No. 173 near Poplar Grove, Illinois and that the defendant Carl Montgomery was driving a Chevrolet automobile in a westerly direction on said highway and was being followed by a Studebaker truck being driven by the defendant, Robert Boyer. The amended complaint charged general negligence on the part of both individual defendants and specifically charged that they were driving their cars on the southerly half of the highway and failed to yield this side of the highway to Wright; that they were driving while intoxicated and drove at a greater rate of speed than was reasonable and proper. As to the defendant, Robert Boyer, the additional charge was made that he negligently passed on the right of the automobile driven by Montgomery and as a result thereof either collided with the truck driven by Wright or caused the automobile driven by Montgomery to collide with the truck driven by Wright. The amended complaint also alleged that at the time of the collision Boyer and Montgomery were servants of the defendant, Wolf Chevrolet Company and were actively engaged in and about business within the scope of their employment.

Answers were filed by the several defendants denying the allegations of due care on the part of Wright, the driver of plaintiff's truck, denying all charges of negligence on the part of Montgomery and Boyer and the answer of the Wolf Chevrolet Company alleged that neither Boyer *nor* Montgomery were its employee/ or servant or engaged in any business for ^{it} ~~them~~ at the time of the accident. A trial was had and at

alleged that between May 10, 1934 and during a crash to
which a driver, bounding along the line, was attached, in an
instantly situation on Illinois State Highway No. 175 near
Rural Grove, Illinois and that the defendant said that
he was driving a Chevrolet automobile in a westerly di-
rection on said highway and was being followed by a third
party whose name being given by the defendant, Robert E. Taylor.
The defendant charged General Taylor with the fact of
being involved in a collision and specifically charged that they
were driving south on the western part of the highway
and failed to yield to the south side of the highway to Taylor, who
then went driving while intoxicated and drove at a greater
rate of speed than was reasonable and proper. As to the
defendant, Robert Taylor, the additional charges and facts that
he negligently passed on the right of the automobile driven
by defendant and as a result thereof either collided with
the third party or failed to avoid the collision and was by
negligence or failure to yield to the right of Taylor. The
defendant charged that the collision was at the side of the collision
Taylor and defendant were concerned of the defendant, who
charged Taylor was not actually injured in the collision
because of the facts of their negligence.
The facts were filed by the several defendants charging
the negligence of the same on the fact of Taylor, the driver
of plaintiff's car, saying all charges of negligence on
the part of defendant and Taylor and the driver of the car
charged defendant charged that neither party was negligent
and was negligent in regard to the collision. A trial was had and as
to the fact of the collision. A trial was had and as

the close of the evidence on behalf of the plaintiff, the jury returned an instructed verdict of not guilty as to each defendant. Thereafter a notice of appeal was filed by the plaintiff and also a praecipe for a record. No judgment, however, was ever rendered by the court upon the verdicts and in the absence of a final judgment the only order this court has jurisdiction to enter is one dismissing the appeal. (Fitzsimmons v. Munch, 74 Ill. App. 259; Chicago Portrait Co. v. Chicago Crayon Co., 217 Ill. 200; Mid City Wholesale Grocers, Inc., v. Bishoff, 327 Ill. App. 268).

We might add that before we discovered that no final judgment had been rendered by the trial court we had considered the merits of the case and concluded that the trial court did not err in directing a verdict at the close of the evidence on behalf of the plaintiff.

For want of a final judgment this appeal must, however, be dismissed.

Appeal dismissed.

the case of the evidence on behalf of the plaintiff, and
jury returned an instructed verdict of not guilty as to each
defendant. Defendant's motion for judgment was denied by the
court and also a judgment for a verdict. On January 10,
1934, the case was argued by the court with the verdict and
in the absence of a final judgment the only order this court
has jurisdiction to enter is one dissolving the writ. (171)
Chicago City & County v. Illinois, 293 Ill. 500; Chicago City & County v.
Illinois, 293 Ill. 500; Chicago City & County v. Illinois, 293 Ill. 500.

It is held that before an order is made as to the
judgment has been rendered by the trial court or not and
whether the writ of habeas corpus was granted or not the writ
shall not be dissolved. A writ of habeas corpus is not dissolved at the close of the
evidence on behalf of the plaintiff.

There is a final judgment with respect to the
writ of habeas corpus.

Chicago City & County.

44321

EDWARD H. S. MARTIN,
Appellant,

v.

FRANK E. SVOBODA,
Appellee.

)
)
) APPEAL FROM CIRCUIT
)
) COURT, COOK COUNTY.
)

335 I.A. 379¹

MR. JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT.

This is an action at law brought by plaintiff, Edward H. S. Martin, to recover damages for legal services alleged to have been rendered by him to defendant, Frank E. Svoboda. The case was tried ex parte before the court and a jury. The jury returned a verdict in favor of plaintiff and assessed his damages at \$3,469.38. Judgment was entered on the verdict against defendant on March 13, 1947. More than 30 days thereafter defendant filed a motion supported by his verified petition to vacate said judgment. After a hearing on defendant's petition and plaintiff's answer thereto the trial court entered a judgment order on August 6, 1947 vacating plaintiff's ex parte judgment of March 13, 1947. Plaintiff appeals.

Plaintiff's petition to vacate alleged in substance that on March 13, 1947 a trial ex parte was had before a jury and Judge Thomas J. Lynch, to whom this cause had been assigned by the "Assignment Judge," which trial resulted in a verdict and judgment in favor of plaintiff and against defendant for \$3,469.38; that said verdict and judgment were erroneous and the court was without jurisdiction to try said cause or enter said judgment for the following reasons: On March 12, 1943 "this cause came on to be tried before Judge Robert Meier and an order was entered * * * withdrawing a juror and returning this cause to the Assignment Judge for reassignment"; on March

EDWARD H. S. MARTIN,)
Appellant,)
v.)
FRANK E. SVOBODA,)
Appellee.)
COURT, COOK COUNTY.
APPEAL FROM CIRCUIT

MR. JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT.

This is an action at law brought by plaintiff, Edward H. S. Martin, to recover damages for legal services alleged to have been rendered by him to defendant, Frank E. Svoboda. The case was tried ex parte before the court and a jury. The jury returned a verdict in favor of plaintiff and assessed his damages at \$3,409.38. Judgment was entered on the verdict against defendant on March 13, 1947. More than 30 days thereafter defendant filed a motion supported by his verified petition to vacate said judgment. After a hearing on defendant's petition and plaintiff's answer thereto the trial court entered a judgment order on August 6, 1947 vacating plaintiff's ex parte judgment of March 13, 1947. Plaintiff appeals.

Plaintiff's petition to vacate alleged in substance that on March 13, 1947 a trial ex parte was had before a jury and Judge Thomas J. Lynch, to whom this cause had been assigned by the "Assignment Judge," which trial resulted in a verdict and judgment in favor of plaintiff and against defendant for \$3,409.38; that said verdict and judgment were erroneous and the court was without jurisdiction to try said cause or enter said judgment for the following reasons: On March 12, 1947 "this cause came on to be tried before Judge Robert Moler and an order was entered * * * withdrawing a juror and returning this cause to the Assignment Judge for reassignment"; on March

16, 1943 plaintiff filed an amended complaint pursuant to leave granted by the court; on March 25, 1943 defendant filed a motion to strike the amended complaint and on May 4, 1943 an order was entered disposing of said motion to strike by requiring plaintiff to file a bill of particulars within five days, "the defendant to answer the same within fifteen days thereafter"; on May 8, 1943 plaintiff filed a bill of particulars and on May 24, 1943 defendant filed a motion to strike same; on June 17, 1943 an order was entered striking said bill of particulars and directing plaintiff to file an amended bill of particulars within twenty days, "defendant to plead thereto within forty days thereafter"; and on June 21, 1943 plaintiff filed an amended bill of particulars and defendant filed a motion to strike same on July 27, 1943.

The petition to vacate further alleged that "no action was ever taken on defendant's motion to strike the Amended Bill of Particulars, in consequence of which said cause was never brought to issue, no order having been made on defendant to plead to the Amended Complaint or Amended Bill of Particulars, and in consequence thereof said cause was not properly on the trial call of the Court for assignment for trial, because of the fact that plaintiff did not and could not file a valid trial notice"; and that "all of the facts hereinabove set forth appear from the record of this Court, notwithstanding which said cause was ordered to trial before a jury without notice to defendant, and, as hereinabove appears, despite the fact that the cause was not at issue, the ex parte trial aforesaid was had, and petitioner represents that the Court was without jurisdiction to submit said cause to a jury, to take the verdict of a jury, and to enter judgment thereon."

16, 1943 plaintiff filed an amended complaint pursuant to leave granted by the court; on March 24, 1943 defendant filed a motion to strike the amended complaint and on May 4, 1943 an order was entered disposing of said motion to strike by requiring plaintiff to file a bill of particulars within five days, "the defendant to answer the same within fifteen days thereafter"; on May 6, 1943 plaintiff filed a bill of particulars and on May 24, 1943 defendant filed a motion to strike same; on June 17, 1943 an order was entered striking said bill of particulars and directing plaintiff to file an amended bill of particulars within twenty days, "defendant to place thereto within forty days thereafter"; and on June 21, 1943 plaintiff filed an amended bill of particulars and defendant filed a motion to strike same on July 27, 1943.

The petition to vacate further alleged that "no action was ever taken on defendant's motion to strike the amended bill of particulars, in consequence of which said cause was never brought to issue, no order having been made on defendant to plead to the amended complaint or amended bill of particulars, and in consequence thereof said cause was not properly on the trial call of the court for assignment for trial, because of the fact that plaintiff did not and could not file a valid trial notice"; and that "all of the facts hereinabove set forth appear from the record of this court, notwithstanding which said cause was ordered to trial before a jury without notice to defendant, and, as hereinabove appears, despite the fact that the cause was not at issue, the ex parte trial aforesaid was had, and petition-er represents that the Court was without jurisdiction to submit said cause to a jury, to take the verdict of a jury, and to enter judgment thereon."

Defendant's petition to vacate concluded with the prayer that plaintiff's ex parte judgment be vacated and for "such other relief * * * as the Court may deem proper."

Plaintiff's verified answer to the petition to vacate averred in substance that said petition fails to show lack of jurisdiction and that since neither defendant's motion nor petition to vacate was filed within thirty days after the entry of the judgment complained of the court had no jurisdiction to grant said motion or petition; that neither said verdict nor judgment was erroneous, but were it otherwise, the court would have no right of power to correct its own error on motion made or petition filed more than thirty days after entry of the judgment; that the court had jurisdiction to try said cause and enter said judgment; that no order was ever entered requiring or permitting defendant to answer any bill of particulars within fifteen days thereafter and there is no record of any such order, but said order provided that the time for defendant to answer in said cause be extended for fifteen days thereafter, - meaning to answer said amended complaint; that no order was entered June 17, 1943, nor ever, as claimed in said petition, directing or permitting defendant to plead to any bill of particulars within forty days thereafter, and there is no record of any such order, but instead the order actually made and entered June 17, 1943, directed or permitted defendant to plead therein within forty days thereafter and thereby merely extended defendant's time forty days thereafter to answer said amended complaint; that the motion to strike filed July 27, 1943, was never called to the attention of the court prior to entry of final judgment; that the aforesaid orders were made on defendant to plead to the amended complaint and the order made and entered March 16, 1943,

Defendant's petition to vacate conformed with the
prayer that plaintiff's ex parte judgment be vacated and for
"such other relief * * * as the Court may deem proper."
Plaintiff's verified answer to the petition to vacate
averred in substance that said petition fails to show lack of
jurisdiction and that since neither defendant's motion nor
petition to vacate was filed within thirty days after the
entry of the judgment complained of the court had no jurisdic-
tion to grant said motion or petition; that neither said verified
nor judgment was erroneous, but were it otherwise, the court
would have no right of power to correct its own error on motion
made or petition filed more than thirty days after entry of the
judgment; that the court had jurisdiction to try said cause and
enter said judgment; that no order was ever entered requiring
or permitting defendant to answer any bill of particulars within
fifteen days thereafter and there is no record of any such order,
but said order provided that the time for defendant to answer in
said cause be extended for fifteen days thereafter, - meaning to
answer said amended complaint; that no order was entered June 17,
1943, nor ever, as claimed in said petition, directing or per-
mitting defendant to plead to any bill of particulars within
forty days thereafter, and there is no record of any such order,
but instead the order actually made and entered June 17, 1943,
directed or permitted defendant to plead therein within forty
days thereafter and thereby merely extended defendant's time
forty days thereafter to answer said amended complaint; that the
motion to strike filed July 27, 1943, was never called to the
attention of the court prior to entry of final judgment; that
the aforesaid orders were made on defendant to plead to the
amended complaint and the order made and entered March 16, 1943,

permitting plaintiff to file an amended complaint recited defendant was thereby given fifteen days to plead thereto as appears of record; that as appears of record a valid trial notice was served and filed by plaintiff and the cause was properly on the trial call for assignment for trial and was assigned for trial and it was not necessary that a trial notice be filed more than once; that said cause was not tried without notice but appeared on trial regularly and in accordance with the rules when called for trial and tried and the court had complete jurisdiction; that the aforesaid proceedings having been performed in exercise of jurisdiction, it is immaterial whether they were erroneous or not and the court had as full jurisdiction to act erroneously as correctly; that, however, the court did not act erroneously, the last bill of particulars was not a pleading, required no answer, stood unassailed in any proper way in absence of any motion called to the attention of the court and did not prevent trial nor receiving any evidence not objected to; that at the time of the last trial defendant's time to answer the amended complaint had expired and if there was no answer on file it was immaterial whether the court would cause default to be entered and damages to be assessed by a jury and judgment entered for damages so assessed, or would permit plaintiff to waive filing of answer and submit the issues to a jury and require it to find the issues for plaintiff and assess plaintiff's damages preliminary to entry of judgment; that at the time of entry of final judgment defendant did not have any defense to plaintiff's claim on which judgment was entered; that there is no equitable defense to plaintiff's claim; that defendant was not diligent in defense of said suit but was negligent therein.

Three orders of court were presented in evidence by defendant on the hearing on the petition to vacate and the answer

permitted plaintiff to file an amended complaint revised de-

endant was thereby given fifteen days to plead thereto as

appears of record; that as appears of record a valid trial notice

was served and filed by plaintiff and the case was properly on

the trial call for assignment for trial and was assigned for trial

and it was not necessary that a trial notice be filed more than

once; that said case was not tried without notice but appeared

on trial regularly and in accordance with the rules when called

for trial and tried and the court had complete jurisdiction; that

the aforesaid proceedings having been performed in exercise of

jurisdiction, it is immaterial whether they were erroneous or

not and the court had as full jurisdiction to set erroneously

as correctly; that, however, the court did not set erroneously,

the last bill of particulars was not a pleading, required no

answer, stood unassailed in any proper way in absence of any

motion called to the attention of the court and did not prevent

trial nor receiving any evidence not objected to; that at the

time of the last trial defendant's time to answer the amended

complaint had expired and if there was no answer on file it was

immaterial whether the court could cause default to be entered

and damages to be assessed by a jury and judgment entered for

damages so assessed, or would permit plaintiff to have filling

of answer and submit the issues to a jury and require it to find

the issues for plaintiff and assess plaintiff's damages pro rata-

nary to entry of judgment; that at the time of entry of final

judgment defendant did not have any defense to plaintiff's claim

on which judgment was entered; that there is no available defense

to plaintiff's claim; that defendant was not diligent in defense

of said suit but was negligent therein.

These orders of court were presented in evidence by de-

fendant on the hearing on the petition to vacate and the answer

thereto and that was the only evidence adduced at said hearing.

The first of these orders, which was entered on March 16, 1943, is as follows:

"On motion of John B. King, attorney for plaintiff, leave is given plaintiff to file an amended complaint herein, and defendant is hereby given 15 days to plead thereto."

The second order, entered May 4, 1943, is as follows :

"It is ordered that said motion[[to strike the amended complaint] be and the same is hereby disposed of as follows:

"It is further ordered that plaintiff file his bill of particulars within 5 days and that the time for defendant to answer be extended 15 days thereafter."

The third order, entered June 17, 1943, is as follows:

"It is ordered that said bill of particulars be and the same is hereby stricken; that plaintiff be and he is hereby ordered to file an amended bill of particulars within 20 days, defendant to plead herein within 40 days thereafter."

We deem it appropriate at this point to refer briefly to certain allegations of defendant's petition to vacate and to the orders of court introduced in evidence by him.

As heretofore shown, the petition to vacate alleged that an order was entered on May 4, 1943 disposing of defendant's motion to strike the amended complaint by requiring plaintiff to file a bill of particulars within five days, "the defendant to answer the same within fifteen days thereafter." The import of the order referred to in said allegation was changed by inserting in the quoted portion thereof the words "the same," to make it appear that defendant was directed to answer the bill of particulars within fifteen days after it was filed. Said order, heretofore set forth, after requiring plaintiff to file a bill of particulars within five days, directed "the defendant to answer within fifteen days thereafter," meaning thereby to answer the amended complaint.

A similar misrepresentation was made in the allegation

therefore and that was the only evidence used at said hearing.

The first of these orders, which was entered on March 16, 1943, is as follows:

"On motion of John B. King, attorney for plaintiff, leave is given plaintiff to file an amended complaint hereto, and defendant is hereby given 15 days to plead thereto."

The second order, entered May 4, 1943, is as follows: "It is ordered that said motion to strike the amended complaint be and the same is hereby disposed of as follows:

"It is further ordered that plaintiff file his bill of particulars within 5 days and that the time for defendant to answer be extended 15 days thereafter."

The third order, entered June 17, 1943, is as follows: "It is ordered that said bill of particulars be and the same is hereby stricken; that plaintiff be and he is hereby ordered to file an amended bill of particulars within 10 days, defendant to plead hereto within 40 days thereafter."

It has been found appropriate at this point to refer briefly to certain allegations of defendant's petition to vacate and to the orders of court introduced in evidence by him.

As heretofore shown, the petition to vacate alleged that an order was entered on May 4, 1943 dissolving of defendant's motion to strike the amended complaint by requiring plaintiff to file a bill of particulars within five days, "the defendant to answer the same within fifteen days thereafter." The record of the order referred to in said petition was changed by inserting in the quoted portion thereof the words "the same," to make it appear that defendant was directed to answer the bill of particulars within fifteen days after it was filed. This order, heretofore set forth, after requiring plaintiff to file a bill of particulars within five days, directed "the defendant to answer within fifteen days thereafter," retaining thereby to answer the amended complaint.

A similar misrepresentation was made in the allegations

of the petition to vacate in reference to the order of June 17, 1943, which directed plaintiff "to file an amended bill of particulars within 20 days, defendant to plead herein within 40 days thereafter." In said petition the word "thereto" was substituted for the word "herein" in alleging the contents of the order of June 17, 1943, for the obvious purpose of having it understood as meaning that he was allowed 40 days to "plead" to the amended bill of particulars, after the latter was filed, rather than to the amended complaint. There is no such procedure known under our practice as filing an answer to a bill of particulars.

There was no formal finding in the judgment order appealed from to indicate whether the trial judge vacated the ex parte judgment in favor of plaintiff because he determined that he lacked jurisdiction to enter it or because of an error of fact which he considered sufficient to preclude its entry.

Plaintiff contends that defendant's petition to vacate should have been denied because (1) "treated as a petition in the nature of a writ of error coram nobis, no error of fact has been shown either by the petition or the evidence" and (2) "treated as a petition to vacate for lack of jurisdiction, the court had jurisdiction and even if the judgment for plaintiff was error, which it was not, that did not affect the jurisdiction."

In defendant's brief he abandons the claim made in his motion and petition to vacate that the court lacked jurisdiction to enter the ex parte judgment in favor of plaintiff and treats said motion as being in the nature of a writ of error coram nobis.

In his attempt to sustain the judgment order appealed from defendant invokes the familiar rule that where a judgment is entered upon an error of fact unknown to the court which, if known, would have precluded the rendition of the judgment, such

of the petition to vacate in reference to the order of June 17, 1943, which directed plaintiff to file an amended bill of particulars within 30 days, defendant to plead herein within 40 days thereafter." In said petition the word "hereafter" was substituted for the word "herein" in assigning the contents of the order of June 17, 1943, for the obvious purpose of having it understood as meaning that he was allowed 40 days to "plead" to the amended bill of particulars, when the latter was filed, rather than to the amended complaint. There is no such procedure known under our practice as filing an answer to a bill of particulars.

There was no formal finding in the judgment order appealed from to indicate whether the trial judge vacated the ex parte judgment in favor of plaintiff because he determined that he lacked jurisdiction to enter it or because of an error of fact which he considered sufficient to preclude its entry.

Plaintiff contends that defendant's petition to vacate should have been denied because (1) "treated as a petition in the nature of a writ of error coram nobis, no error of fact has been shown either by the petition or the evidence" and (2) "treated as a petition to vacate for lack of jurisdiction, the court had jurisdiction and even if the judgment for plaintiff was error, which it was not, that did not affect the jurisdiction."

In defendant's brief he abandons the claim made in his motion and petition to vacate that the court lacked jurisdiction to enter the ex parte judgment in favor of plaintiff and treats said motion as being in the nature of a writ of error coram nobis. In his attempt to sustain the judgment order appealed from

defendant invokes the familiar rule that where a judgment is entered upon an error of fact unknown to the court which, it is known, would have precluded the rendition of the judgment, such

judgment may be vacated on motion made under section 72 of the Practice Act at any time within five years after the date of its entry (par. 196, chap. 110, Ill. Rev. Stat. 1945).

The fact upon which defendant relies as constituting an error of fact, which warranted the vacation of the judgment in question, is that plaintiff proceeded with the ex parte trial that resulted in said judgment in his favor without apprising the court that the case was not at issue and it is stated in defendant's brief that "plaintiff alone knew that defendant's motion to strike the amended bill of particulars and amended complaint (filed in apt time and in accordance with section 37 of the Civil Practice Act of Illinois) was pending and undisposed of." (Italics ours.)

It is stated and reiterated in defendant's brief that there was a pending and undisposed of motion to strike plaintiff's amended complaint, although, according to the petition to vacate, the undisposed of motion to strike was directed solely to the amended bill of particulars.

It is true that the motion to strike the amended bill of particulars was filed in apt time but, as will be hereinafter shown, it was due solely to defendant's negligence that said motion remained undisposed of at the time of the trial, which resulted in the ex parte judgment in favor of plaintiff.

Section 37 of the Civil Practice Act pertaining to bills of particulars (par. 161, chap. 110, Ill. Rev. Stat. 1945) provides in subsections 1 and 2 thereof as follows:

"Where allegations are so wanting in details, that the opposite party should be entitled to a bill of particulars, the pleader shall file and serve a copy of such bill on being served with a notice demanding the same, which notice shall point out specifically the defects complained of or the details desired, and if such bill be demanded before the expiration of the time for filing a pleading, the opposite party shall have the same time to plead after receiving the bill of particulars to which he was entitled at the time of serving such notice.

"If the party shall unreasonably neglect to furnish a bill of particulars, or if the bill of particulars delivered be insufficient, the court may in its discretion strike the pleading, allow further time to furnish such bill of particulars or require a more particular bill to be delivered."

It will be noted that under the foregoing provisions of the statute a bill of particulars is not treated as a pleading, that such a bill must be furnished in the first instance merely upon notice demanding same, that if the bill of particulars delivered be insufficient, the court may in its discretion strike the pleading to which it relates and that on motion the court may require a more particular bill to be delivered. Since the amended bill of particulars was not a pleading and since the motion to strike same was in effect a motion for a more particular bill, the mere filing of such motion by defendant without calling it to the attention of the court for disposition, cannot be considered as legally effective for any purpose. In People v. Brickey, 346 Ill. 273, the court said at p. 275:

"A motion is an application made to the court, and the mere filing of a paper in the office of the clerk is not such an application. It must be brought to the attention of the court and the court asked to rule on it. (City of Decatur v. Barteau, 260 Ill. 612; City of Marengo v. Eichler, 245 id. 47.) Counsel not having done so, no question with reference thereto arises upon this review. People v. Keedy, 84 Ill. 569."

(Velde v. Schrock, 253 Ill. App. 274, is to the same effect.)

Defendant, having failed to ask the court to rule on his motion to strike the amended bill of particulars prior to the trial that resulted in the ex parte judgment against him, was in no better position than he would have been if he had not filed such motion to strike. The amended bill of particulars was filed on June 21, 1943 and defendant having failed to "plead" to the amended complaint within forty days thereafter, as the order of June 17, 1943 directed, the time within which he was required or permitted to answer the amended complaint expired in August, 1943.

It cannot be said that the fact that defendant's motion

"If the party shall immediately request to furnish a bill of particulars, or if the bill of particulars delivered be insufficient, the court may in its discretion strike the pleading, allow further time to furnish such bill of particulars or require a more particular bill to be delivered."

It will be noted that under the foregoing provisions of the statute a bill of particulars is not treated as a pleading, that such a bill must be furnished in the first instance merely upon notice demanding same, that if the bill of particulars delivered be insufficient, the court may in its discretion strike the pleading to which it relates and that on motion the court may require a more particular bill to be delivered. Since the amended bill of particulars was not a pleading and since the motion to strike same was in effect a motion for a more particular bill, the mere filing of such motion by defendant without calling it to the attention of the court for disposition, cannot be considered as legally effective for any purpose. In Brichley, 246 Ill. 274, the court said at p. 275:

"A motion is an application made to the court, and the mere filing of a paper in the office of the clerk is not such an application. It must be brought to the attention of the court and the court asked to rule on it. (City of Peoria v. Herberger, 260 Ill. 512; City of Peoria v. Herberger, 4 Ill. 487) and not having done so, no question with reference thereto arises upon this review. People v. Kelly, 34 Ill. 209."

(Volde v. Schrock, 275 Ill. 197, 274, is to the same effect.) Defendant, having failed to ask the court to rule on his motion to strike the amended bill of particulars prior to the trial that resulted in the ex parte judgment against him, was in no better position than he would have been if he had not filed such motion to strike. The amended bill of particulars was filed on June 21, 1943 and defendant having failed to "plead" to the amended complaint within forty days thereafter, as the order of June 17, 1943 directed, the time within which he was required or permitted to answer the amended complaint expired in August, 1943. It cannot be said that the fact that defendant's motion

to strike the amended bill of particulars was pending and undisposed of or that he had not filed an answer to the amended complaint were unknown to the court because these were matters of record in the case, of which the court had at least constructive knowledge. Nor can it be said that the matter of the case not being at issue could be made known to the court as an error of fact of which it was ignorant, when it is considered that the record in this case was before the court and would have disclosed upon examination that the time within which defendant was required or permitted to file an answer to the amended complaint had long since expired.

Merely because the case was not at issue for the reasons heretofore shown, when it was tried ex parte, did not constitute an error of fact which would justify setting aside plaintiff's ex parte judgment by a motion in the nature of a writ of error coram nobis under section 72 of the Practice Act.

Furthermore, defendant failed to allege in his petition to vacate that he had any defense on the merits to plaintiff's claim or that he was diligent in his defense of the suit.

For the reasons stated herein the judgment order of the Circuit court of Cook county of August 6, 1947, which vacated plaintiff's judgment of March 13, 1947, is reversed.

JUDGMENT ORDER OF AUGUST 6, 1947,
WHICH VACATED JUDGMENT OF MARCH
13, 1947, REVERSED.

Friend, P. J., and Scanlan, J., concur.

to state the amended bill of particulars and pending and under-
stood of or that he had not filed an answer to the amended com-
plaint were unknown to the court because these were matters of
fact in the case, of which the court had at least constructive
knowledge. Nor can it be said that the matter of the case not
being at issue could be made known to the court as an error of
fact of which it was ignorant, when it is considered that the
record in this case was before the court and would have dis-
closed upon examination that the time within which defendant
was required or permitted to file an answer to the amended com-
plaint had long since expired.

Merely because the case was not at issue for the reasons
herebefore shown, when it was tried on facts, did not constitute
an error of fact which would justify setting aside plaintiff's
or party judgment by a motion in the nature of a writ of error
coram nobis under section 74 of the practice act.

Further, defendant failed to allege in his position
to vacate that he had any defense on the merits to plaintiff's
claim or that he was obliged in the defense of the suit.

For the reasons stated herein the judgment order of the
circuit court of Cook county of August 6, 1947, which vacated
plaintiff's judgment of March 13, 1947, is reversed.

JUDGMENT ORDER OF AUGUST 6, 1947,
WHICH VACATED JUDGMENT OF MARCH
13, 1947, REVERSED.

WILLIAM J. J. and Lillian J. J. consent.

apt
Abstract

Gen. No. 10254

IN THE

IN THE APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

May Term, A. D. 1948

JOE KATZ and LEO KATZ,
Plaintiffs-Appellees,

vs

HENRIETTA LILLIAN GOLDBERG and
SAMUEL GOLDBERG,
Defendants-Appellants.

Appeal from
Circuit Court,
Winnebago County

Hon. William R. Dusher,
Judge Presiding.

713
3351.A. 379²

Bristow, J.

During the summer of 1945 the Appellees and Appellants became involved in a sharp disagreement in the City of Rockford, Winnebago County, Illinois. The controversy which precipitated the present litigation came about as follows: Ely, Joe, and Leo Katz resided and were engaged in various merchandising enterprises in the City of Waterloo, Iowa. The Goldbergs operated a retail and wholesale grocery, fruit and meat business known as the B and G Fruit Company in the City of Rockford, Illinois. In the month of July, 1945, Ely Katz, who had been engaged in the meat business for more than twenty-five years but who was retired, received a letter from the Goldbergs wherein they sought to interest him in the proposition of joining them as a partner in their business. Then, Henrietta Goldberg called long distance and talked with Ely Katz, and invited him to come to Rockford to investigate their proposal. Shortly thereafter, the three gentlemen from Iowa went to Rockford and negotiations commenced.

Just what the proposals, negotiations and agreements were at the times of their several meetings is the subject of much dispute. Be that as it may, the Katzs contended that the Goldberg

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[illegible]

violated their agreements to enter into a partnership, and contended that they have been greatly damaged thereby and brought suit in the Circuit Court of Winnebago County to recover such damages. At the close of the plaintiffs' evidence, Ely Katz dismissed his suit. Joe Katz and Leo Katz were successful in their claims, the jury returning a verdict in Joe's favor in the sum of \$2000, and in Leo's favor in the sum of \$3500. The Court ordered remittiturs in Joe's case in the sum of \$647.57, and in Leo's case of \$873. These being indulged in by the plaintiffs, there was entered in Leo's case a judgment for \$2720, and in Joe's case a judgment in the sum of \$1352.50. The defendants appealing therefrom, land the case in this court.

Entertaining as we do the view that this suit should be tried again, it is unnecessary for us to detail at any length the entire factual situation involved herein. Suffice it to say that the Katz boys sold their respective businesses and homes in Waterloo and moved to Rockford confidently expecting to join the Goldbergs in what appeared to be a very prosperous enterprise. Their relationship became strained at the outset, many disagreements arose, and much discord prevailed. The deal "blew up", and the Katzs went back home. If you should believe the testimony of the plaintiffs, there would be no question about the virtue of their claims. If you should subscribe to the version of the transaction as told by the Goldbergs, their defense must be accorded merit.

There are two reasons why we feel that this case must be tried again. First, we are of the opinion that it was error for the court to give for the plaintiffs their tendered instruction No. 14, which reads as follows: "If, from the evidence of the case and under the instructions of the court the jury shall find the issue for the plaintiffs and that the plaintiffs have sustained

damages as charged in the complaint, then, to enable the jury to estimate the amount of such damages it is not necessary that any witness should have expressed an opinion as to the amount of such damage, if any, but the jury may themselves make such estimate, from the facts and circumstances proved by a preponderance of the evidence pertaining to damages, and by considering them in connection with their knowledge, observation and experience in the business affairs of life." The plaintiffs claimed in their complaint that their losses resulted from the sale of their business and homes in Waterloo, Iowa, and also the loss of profits in the proposed new partnership agreement. The plaintiffs abandoned this last element of damage and made no proof to sustain the same. The other two elements are susceptible of definite and accurate proof, and they are not of that character where the jury should be permitted to speculate or draw upon their own personal knowledge and experience. Support for this view can be found in the case of Ottawa Gas and Coke Co. v. Graham, 28 Ill. 73. The giving of an instruction similar to the one in question has been uniformly approved in personal injury cases where pain and suffering are elements of damage, for there these are obviously incapable of accurate and definite proof.

The trial court became a little impatient with Henrietta Goldberg when her answers to questions on cross examination appeared too evasive and unsatisfactory. We can fully appreciate the Court's trying experience. We have read the ~~entirety~~ ^{entire} of her testimony and find it most exasperating. Nevertheless, that does not excuse the trial judge in losing sight of the fact that he is not one of the trial lawyers. The following questions and answers will reveal what took place in the presence of the jury.

"Mr. Page: This afternoon you testified you told him you would sign the contract after the attorney had put the notary seal on it and a 30 days set time had gone by. Which answer is right?

Witness: In 30 days, it would just take that much time to figure out the inventory in order to have everything right; I told him that the inventory will be taken to the attorney and he puts his seal on it and then I will sign the contract.

The Court: Witness, at the time that same question was asked you before, you said at the end of 30 days. Now, which one of your three answers is correct?

Mr. Knight: I object to the remarks of the court.

The Court: Overruled. The witness has made three answers to exactly the same question and I want to find out which one is correct.

Mr. Knight: I object to the court's statement in the presence of the jury, interfering with the functions of the jury; it is for the jury to pass on which one is correct.

The Court: The court is going to ask her which one is correct.

The Court: Do you know? (To Mr. Knight)

Mr. Knight: I object to the Court's question.

The Court: Do you?

Mr. Knight: I refuse to answer the question. I don't have to answer it.

The Court: The witness is going to have to answer it. Which one of those three statements is correct?

(No answer.)

The Court: Do you understand what I mean?

The Witness: No, I don't, your Honor.

The Court: Now, in your deposition you said that you would sign the contract as soon as the inventory was taken and previously you

testified--you said you told Mr. Katz you would sign the contract when the inventory was taken and it was submitted to your lawyer and a notary public seal was put on it and 30 days had expired to see that everything was satisfactory. Now, you testified that you said you would sign the contract as soon as the inventory was taken and it was submitted to the lawyer and the notary public seal was put on. Which one of those three statements is correct?

Mr. Knight: We renew our objection to the question of the court.

The Court: Objection overruled.

Mr. Knight: I wish to object to it for the further reason, I think this witness has already explained any statement she made at any time and this type of question would preclude her and force her to say which was correct--therefore, I object to it.

The Court: She has the right to explain it and that is just what I am asking her to do. Which one of those three statements is correct?

Witness: May I explain it?

The Court: All right, explain in your own way.

Witness: We haven't set a time as far as the time when the inventory should be taken and he asked me how long it would take and I told him it would take every bit of thirty days in figuring it up so therefore I stated, after the inventory, contract will be signed, because we talked about it will take that much time to figure it up--there is a lot of figures, and thousands of items so I told him it will take every bit of 30 days--therefore I said--after the inventory and after the 30 days--that it will take 30 days, there are so many figures to check with it and after that we will know and it will be put in the contract how much it was and then I will sign the contract.

The Court: All right, go ahead."

From the foregoing, it is inconceivable that the jury could have received any other than the impression that the trial court thought Henrietta was not a truthful person. The jury has the exclusive right to determine the credibility of witnesses. It has often been held that a trial judge must be very careful in his examination of witnesses in the presence of a jury. Merritt v. Bush, 122 App. 189; Dunn v. People, 172, Ill. 595.

We are of the opinion that these errors compel us to reverse and remand this cause for another trial.

REVERSED AND REMANDED.

Abstract

No. 10317.

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

335 I.A. 380

OCTOBER TERM, A. D. 1948.

THE PEOPLE OF THE STATE OF ILLINOIS,
Plaintiff-Defendant in Error,

vs.

CHARLES A. HELFFRICH,
Defendant-Plaintiff in Error.

Writ of Error to
Circuit Court of
LaSalle County.

Per Curiam.

The Plaintiff in Error, Charles A. Helffrich, is the duly elected State's Attorney of LaSalle County, Illinois, and has been acting in that capacity since 1944.

On June 14, 1948, one of the Judges of the Circuit Court of LaSalle County, Illinois, impanelled a Grand Jury for the June Term of said Court. After a foreman had been appointed, and the Grand Jury had been sworn, the presiding judge, in the course of his instructions to the jury, stated as follows: "Inasmuch as an investigation into a failure in the administration of justice involves public officials to such an extent that the State's Attorney would be disqualified to act, it becomes the duty of the court to appoint a Special State's Attorney, and possibly special investigators to assist him in such investigations and in taking such action as may

Admitted

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is no

Admission to the Court

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Admission to the Court

THE PEOPLE OF THE STATE OF ILLINOIS,
Plaintiff-Defendant in Error,

vs.

GEORGE A. WATKINS,
Defendant-Plaintiff in Error.

for Plaintiff.

The Plaintiff in Error, George A. Watkins, is the

only elected State's Attorney of LaSalle County, Illinois, and

has been acting in that capacity since 1931.

On June 14, 1934, one of the Judges of the Circuit Court

of LaSalle County, Illinois, designated a Grand Jury for the term

beginning at said Court. After a foreman had been appointed, and the

Grand Jury had been sworn, the presiding Judge, in the course of

his instructions to the Jury, stated as follows: "I understand as an

investigation into a failure in the administration of justice in-

volves public officials to such an extent that the State's Attorney

would be disqualified to act, it becomes the duty of the Court to

appoint a Special State's Attorney, and possibly special investigators

to assist him in such investigations and in taking such action as may

2.

be necessary or appropriate in all matters pertaining to enforcement and failure in enforcement of the gaming laws of this State and failures in the administration of justice in this county."

After the presiding judge had concluded his instructions, he appointed a bailiff for the Grand Jury. The Plaintiff in Error then attempted to object to the Court appointing a special State's Attorney to conduct the investigation. The record discloses quite a colloquy between the presiding judge, and the Plaintiff in Error, at the conclusion of which the trial court found the State's Attorney in contempt of Court, and sentenced him to pay a fine of \$200.00. From this judgment the State's Attorney has brought the case to this Court on a writ of error. We are cognizant of the facts, as disclosed by the abstract and record, but it would serve no useful purpose to make a detailed statement of the facts, as it is there disclosed.

After consideration of the whole record, it is our conclusion that the trial court erred in finding the plaintiff in error guilty of contempt of Court, and the judgment finding him in contempt of Court is hereby reversed.

Judgment reversed.

A necessary or appropriate in all future proceedings to enforce
the failure to enforcement of the federal laws of this state
and failure to law administration of justice in this country.
After the provided judge had considered the testimony,
he appointed a referee on the same day. The Plaintiff in error
then attempted to object to the Court appointing a special referee
a necessary to conduct the investigation. The record discloses that
a colloquy between the presiding judge, and the Plaintiff in error,
at the conclusion of which the trial court found the State's attorney
in contempt of Court, and sentenced him to pay a fine of \$250.00.
From this judgment the State's attorney has brought the case to this
Court on a writ of certiorari. He was defendant in the lower, as dis-
closed by the evidence and record, but it would serve no useful
purpose to make a detailed statement of the facts, as it is well
disclosed.

After consideration of the record, and in our opinion
the trial court acted in finding the Plaintiff in error
guilty of contempt of Court, and the judgment finding him in contempt
of Court is hereby reversed.

Reversed.

STATE OF ILLINOIS

APPELLATE COURT—THIRD DISTRICT

AT AN APPELLATE COURT, Begun and held for the Third District of the State of Illinois, at

Springfield, on the FIRST TUESDAY in OCTOBER A. D. 19⁴⁸

PRESENT

335 I.A. 562

HONORABLE RALPH J. DADY, Presiding Justice

HONORABLE HARRY E. WHEAT, Justice

HONORABLE CHARLES A. O'CONNOR, Justice

Attest: ROBERT L. CONN, Clerk.

BE IT REMEMBERED, that afterward, to-wit: On the 29th day of

OCTOBER, A. D. 19⁴⁸, there was filed in the office of the said Clerk of said Court,

an opinion of said Court, in words and figures following:



Edith Barnett, Appellee, vs. E. C. Clark, Appellant.

General No. 9608

MR. PRESIDING JUSTICE DADY delivered the opinion of the Court:

This cause is before us on appeal by defendant-appellant, E. C. Clark, from a judgment of the Circuit Court entered January 8, 1948, which dismissed defendant's petition to vacate a judgment entered by confession against defendant.

On December 12, 1947, the plaintiff-appellee Edith Barnett filed in the Circuit Court a complaint and cognovit based on a judgment form promissory note for \$400, executed by defendant, dated May 10, 1941, payable to the order of Josephine Allen six months after its date, with interest at 6% per annum until paid. The complaint alleged that "said note was duly assigned to plaintiff by the administrator of the Estate of Josephine Allen, deceased," and that the plaintiff was the owner and holder of such note.

The judgment was entered in vacation by the clerk of the court on December 12, 1947, for the sum of \$631, which sum included \$75 as attorney's fees for the plaintiff.

Although the complaint and cognovit described Edith Barnett as plaintiff, the clerk of the court erroneously entered the judgment in favor of "Bertha Barnett" instead of Edith Barnett.

On December 23, 1947, the defendant filed his petition to vacate such judgment and defend on the merits. The petition further stated that such clerk had no authority to determine and assess reasonable attorney's fees in vacation in the sum of \$75 or in any amount.

Attached to and made a part of the petition was an affidavit by defendant which stated that plaintiff came into possession of the note after the maturity thereof and without the payment of any consideration, and then knew that defendant had refused to pay the note because he had received no consideration therefor; that during the "year 1940 and 1941" one McConathy represented himself as the agent of said Josephine Allen, and stated to defendant that he was preparing



to drill some oil wells in Illinois and had organized a company and was selling stock to raise money to drill such wells, that if defendant would execute said note for \$400 defendant would receive therefor stock and securities of said company in that amount and participate in the profits from the wells; that the defendant thereupon executed said note; that defendant knew Josephine Allen; that said company was never organized and said stock and securities were never delivered to defendant, and said oil wells were never drilled and no authority was ever granted to McConathy or Josephine Allen to sell and deal in securities and stock or sell the same to the public; that defendant never at any time received any consideration whatever for said note; that defendant has repeatedly demanded such stock or securities or that he receive said note back, but that McConathy, although promising to do so has never returned the same; that Josephine Allen "knew and was aware of the above facts during her lifetime."

The plaintiff moved that said petition to vacate be dismissed on the ground that the affidavit of the defendant did not affirmatively show that the defendant, if sworn as a witness, could testify to the facts stated in said affidavit; that Edith Barnett brought said action as heir of Josephine Allen, a deceased person, and that by reason of the statute the defendant was incompetent to testify on his own behalf and therefore not a competent witness, and that said petition to vacate alleged conclusions and failed to show facts that defendant had a meritorious defense.

Attached to said motion was the affidavit of Edith Barnett in which she stated that she was the plaintiff and "the daughter of Josephine Allen who died intestate" on November 16, 1941, and that "she was the only heir at law of said Josephine Allen." No evidence was heard in support of the motion or petition and none considered other than such supporting affidavits.

After the appeal was perfected and a transcript of the record and defendant's printed abstracts and briefs were filed in this court, the Circuit Court, on motion, allowed its records to be amended so as to allow the clerk of the Circuit Court to correctly enter the name of the plaintiff as the one in whose favor judgment was entered instead of "Bertha Barnett."



The judgment provision in the note provided that "a reasonable sum _____ dollars attorney's fees" be included in any judgment. Such provision did not authorize the clerk to include any attorney's fee in the judgment. (*Havens & Geddis Co., v. First National Bank*, 162 Ill. 35.)

Such judgment clause in the note also stated that the maker of the note would "release all errors that may intervene in the entering of judgment." It is our opinion that such last provision did not bar the defendant from successfully contending that the judgment should not have contained any allowance of attorney's fees. (*First National Bank of New Paris v. Royer*, 273 Ill. App. 158.)

It is not argued that the facts alleged in the motion of the defendant to vacate, if well pleaded and proven to be true, would not constitute a good defense to the note as against an assignee after maturity.

Plaintiff contends that the motion and affidavit of the defendant are insufficient because of conclusions. We believe this is also true of the plaintiff's motion and supporting affidavit. Therefore the plaintiff is in no position to successfully make this complaint.

Plaintiff next contends that the defendant's affidavit is insufficient in not stating that the defendant could competently testify to the facts therein alleged. We believe the affidavit was sufficient in this respect. (See *Selimos v. Marinos*, 323 Ill. App. 144, 149.)

Plaintiff next contends that the defendant would be an incompetent witness for the reason that plaintiff was the only heir of Josephine Allen, and that plaintiff would therefore be incompetent because of the provisions of Sec. 2, Ch. 51, Ill. Rev. Stats. It will be noted that the complaint does not state that the plaintiff brought suit as heir of Josephine Allen, but as assignee of the administrator of the estate of Josephine Allen, deceased. The question of the competency of the defendant as a witness will properly be passed upon when the issues have been settled by the pleadings and the defendant attempts to testify.

The judgment of the trial court is reversed and the cause is remanded with directions to deny the motion of plaintiff to dismiss the petition of defendant, and for further proceedings consistent with this opinion.

REVERSED AND REMANDED.

I, ROBERT L. CONN, Clerk of said Appellate Court, do hereby certify the foregoing to be a true copy of the OPINION OF SAID COURT in said cause as the same appears from the records and files of my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and the seal of said Court,
at Springfield, Illinois, this 4th day of March 19 61





Clerk Appellate Court, Third District.

GENERAL NO. 9608

Edith Barnett,

Plaintiff-Appellee,

vs.

E. C. Clark,

Defendant-Appellant.

State of Illinois
APPELLATE COURT
Third District

Abstract

STATE OF ILLINOIS
APPELLATE COURT
THIRD DISTRICT

October Term, A.D. 1948

335 I.A. 783

General 9606

Agenda No. 6

PETER FRISCH,
Plaintiff-Appellee,)
vs.) Appeal from the
PAUL KNAPP,) Circuit Court of
Defendant-Appellant.) McLean County, Illinois,

O'Connor, J.

Peter Frisch, the plaintiff in this suit, about 4:30 in the afternoon of July 29, 1947, was riding to his place of employment in a 1935 Dodge automobile owned by him and being operated by his son, Edward Frisch. The car was being driven in an easterly direction on Front Street in the City of Bloomington, Illinois. The defendant, Paul Knapp, was driving his 1941 Chevrolet in a northerly direction on Mason Street near its intersection with Front Street. The cars collided at the intersection and Frisch brought suit in the Circuit Court of McLean County for his damages, amounting to \$132.22. Defendant Knapp filed a counter claim for his damages, which the evidence showed to be in the amount of \$20.00. The case was tried before the court without a jury. The Court found the issues in favor of the plaintiff, and

assessed his damages at \$132.22 and entered judgment in favor of the plaintiff for this amount. The defendant has prosecuted an appeal to this Court.

The evidence shows that plaintiff's car was being driven in an easterly direction at the rate of between 20 and 25 miles per hour. Plaintiff's car entered the intersection at that rate of speed after the driver had looked both ways and had observed nothing coming from the north or south. The driver heard his father say "look out" and he saw a car approaching from the south. The impact occurred in the east portion of Front Street immediately after he had crossed the center line of the intersection. It is undisputed that the plaintiff's car was struck on both right doors, caved in the rear door, damaged the rear left fender and broke both windows on that side of the car. After the collision plaintiff's car stopped headed east, the front end even with the east curb of Mason Street and 3 or 4 feet from the Front Street curb on the south side of that street. Neither the plaintiff nor his son saw the defendant's car until it was 10 feet from them. The plaintiff contends that the Knapp car X did not enter the intersection until after his car had entered. Edward Frisch, the plaintiff's son, saw skid marks made by defendant's car for a distance of thirty feet backward from the point of the impact.

In the defendant's car were the defendant, who was driving; in the front seat with him was his wife, and riding in the back seat were two children of the defendant and Mrs. Patricia Ryan and a baby. Defendant was not acquainted with

the streets of Bloomington and was driving north on Mason Street looking for Lee Street. His speed was about 20 miles per hour. He first observed the Frisch car when he was 20 to 25 feet away from it and about 4 feet in the intersection. He testified that he tried to stop by applying his brakes, and turned to the right, or easterly, prior to the collision, and that his car was barely moving at the time of the impact. After the collision his car came to a stop close to the center of the intersection, facing northeast, 6 or 8 feet from the Frisch car, the front end of the car being 4 feet south of the center of Front Street and near the center of Mason Street.

The defendant produced no testimony as to the speed of the plaintiff's car. With regard to other important facts, the evidence as given by the witnesses was in sharp conflict.

From the evidence it would appear to this Court that the plaintiff, proceeding at the speed of 20 to 25 miles an hour, must have entered the intersection first; that the defendant applied the brakes on his car before he entered the intersection as shown by the skid marks, and was unable to stop in time to avoid an impact, and therefore must have seen the plaintiff's car enter the intersection before he did, at a speed that was not unreasonable, and that the plaintiff was not guilty of any contributory negligence. It also appears to this Court that the trial judge reached the same conclusion. In the trial of the case he saw and heard the witnesses, and had advantages which we do not possess in judging the weight which should be given to their testimony where there is a conflict.

A court of review is reluctant to set aside a finding of fact of the trial court or a verdict of a jury, unless it is clearly against the manifest weight of the evidence.

Under the facts as disclosed by this record, it is the view of this court that the plaintiff Frisch was not guilty of any negligence that contributed to the proximate cause of his injuries, and that the plaintiff Frisch was entitled to the right of way, having entered the intersection first, at a reasonable rate of speed, and is therefore entitled to recover in this suit. The judgment therefore, is affirmed.

Judgment affirmed.

Abstract

STATE OF ILLINOIS

APPELLATE COURT

THIRD DISTRICT

October Term, A. D. 1948

335 I.A. 364

General No. 9585

Agenda No. 1

Frank F. Hovey,
Plaintiff-Appellant,

vs.

Julia C. Stolleis, Administratrix of the
Estate of Fred Stolleis, deceased, and
John Clary,
Defendants-Appellees.

#

Julia C. Stolleis, Administratrix of the
Estate of Fred Stolleis, deceased,
intestate,
Counter-Plaintiff-Appellee,

vs.

Frank F. Hovey,
Counter Defendant-Appellant.

#

Julia C. Stolleis,
Intervening Plaintiff-Appellee,

vs.

Frank F. Hovey,
Defendant-Appellant.

Wheat, J.

Appeal from
Circuit Court
of
Menard County

In an action against Frank F. Hovey and Walter Meredith, for the wrongful death of Fred Stolleis, Julia C. Stolleis, Administratrix, obtained a jury verdict of \$7000 against Hovey, and for property damage a verdict of \$250. In the same suit, in her individual capacity, she obtained a verdict for property damage in the sum of \$306.46. Walter Meredith was found not

to be used

11-53 20-24-10

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ALCOE

Abstract

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IN AN ACTION AGAINST JOHN F. KELLY AND ALICE KELLY, JR.,
FOR THE RECOVERY OF THE COST OF THE
REPAIRS, DAMAGES AND EXPENSES OF THE
AND FOR PROPERTY DAMAGE A VERDICT OF \$100.00. TO THE WIFE
IN HER INDIVIDUAL CAPACITY, AND GRANTING A VERDICT FOR PROPERTY
DAMAGES IN THE SUM OF \$100.00. THE COURT ORDERED THE VERDICT FOR

guilty on all counts. Frank F. Hovey appeals from orders denying motions for judgments notwithstanding verdicts, and orders denying motions for new trial.

The original complaint as amended was filed by Frank F. Hovey against Julia C. Stolleis, Administratrix of the Estate of Fred Stolleis, deceased, and John Clary, for damages to plaintiff's automobile in the sum of \$500. A counter-complaint was then filed by Julia C. Stolleis, Administratrix, against plaintiff Frank F. Hovey and Walter Meredith for damages by reason of the wrongful death of Fred Stolleis and for damages to his automobile. Julia C. Stolleis, in her individual capacity, then filed an intervening complaint against Frank F. Hovey for damages to her automobile in the sum of \$1000. All of the issues were consolidated and tried as one suit. The jury found against Hovey in his suit, and, as above stated, in favor of Julia C. Stolleis, Administratrix, on her counter-claim, and on her suit as an individual, against Hovey.

Appellant Hovey urges that, as to his suit, the evidence established both the absence of contributory negligence on his part, and the negligence of decedent and John Clary by uncontroverted proof. He urges that as to all of the issues the evidence shows the negligence of decedent and John Clary and that such negligence contributed to cause the death of Fred Stolleis. As to the suit of Julia Stolleis, individually, for damages to her car, he claims lack of proof as to any negligence on his part proximately causing the damage. He claims there was no evidence showing a master and servant or agency relationship between himself and Walter Meredith, by reason of which a directed verdict should have been returned for Meredith, rendering his testimony competent on all of the issues. Errors are also assigned in the giving and refusing of instructions.

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From the evidence the following appears undisputed. Fred Stolleis and one Neff entered the former's 1934 Chevrolet automobile at about 6 P.M. (C.D.T.) September 10, 1944. The car would not start. Another automobile driven by one Copper pushed the Chevrolet for over a mile west on Route 123, to a point about six miles east of Petersburg, Illinois, where it was parked on the north shoulder of the road, entirely off of the concrete pavement and from one to three feet north thereof, heading west. It was still daylight, the weather was clear, the pavement dry, and the highway was straight and level for several miles to the east and to the west. Stolleis, by some means, went home to Petersburg, leaving no lights of any kind lighted on his car. After eating dinner he borrowed from his wife, Julia C. Stolleis, her 1941 Chevrolet, and with the brother of Mrs. Stolleis, John Clary, driving, Stolleis and Clary went east to the point where the Stolleis' 1934 Chevrolet was parked, reaching there about 7:45 P.M. It was then almost dark, and at the time of the collision entirely dark. The 1941 Chevrolet, with its headlights on, was parked on the north shoulder, facing east, directly in front of and several feet from the 1934 Chevrolet. The hood on the north side of the 1934 Chevrolet was then raised and the parties worked on the motor for fifteen minutes or more, aided by the lights furnished by the other Chevrolet. Clary stood at the front near the north side of the 1934 Chevrolet and Stolleis at the north side working on the fuel line. The plaintiff Frank F. Hovey, driving a Studebaker automobile westerly on Route 123 a short time after 8 P.M., approached the location of the two parked cars. With him were his wife Lucille, his daughter Frances Meredith, his son-in-law Walter (Tom) Meredith, and Joyce Meredith. Frances and Walter Meredith had been married

and John ... Thomas and ...

that afternoon at Springfield, and the group had put in the car a public address system for the use of Meredith in conducting an 8 o'clock revival meeting that night in Petersburg. The brakes of Hovey's car were in good condition and he was driving with his headlights tilted or low driving lights on. The front of the Hovey car collided with the rear of the 1934 Chevrolet, resulting in damages to all of the cars, and injuries to Fred Stolleis which later caused his death. No cars were coming from the west at the time of the collision.

Contrary to plaintiff's contention that the evidence establishes his due care and also the negligence of decedent and John Clary, or, to rephrase, the lack of due care of decedent and John Clary as well as plaintiff's freedom from negligence, it appears that these were close questions, and as such, properly passed upon by the jury. Citation of authorities is unnecessary to support the fundamental rule that a jury's verdict on this point will not be disturbed unless against the manifest weight of the evidence. It is urged that decedent was obviously negligent in violating the law for failure to have lights on a parked vehicle. However, the violation of a law is merely prima facie evidence of negligence and it must be shown that such violation was the proximate cause of the injuries complained of. Under proper instructions of the court, it was the duty of the jury to determine whether the violation of the law was the proximate cause. The jury decided otherwise. In addition to this, on the subject of plaintiff's negligence or lack of due care, the jury might well have determined from the evidence that he was not keeping a proper look-out or that his car was not equipped with lights powerful enough to properly illuminate the road ahead of him a reasonable distance considering the speed at which he was driving. His own testimony was in part: "Up to

[illegible]

that time as I came up to the place where the lights were I could not see farther than 60 feet directly in front of me. * * * My headlights did illuminate out beyond the paved portion of the shoulder of the highway as I came along. * * * My headlights did not illuminate the vehicle we collided with as I came within 60 feet of it, but when I got within 40 feet of the bright light I saw it." Clearly, the question of plaintiff's lack of due care or negligence was one for the jury.

The testimony of Walter Meredith, plaintiff's son-in-law, and an occupant of his car, was admitted only as to the suit of Julia Stolleis as an individual, inasmuch as he was a co-defendant with Hovey in the action of the administratrix. It was charged that Hovey was an employee or agent of Meredith. The jury found Meredith not guilty and answered a special interrogatory in the negative as to whether Hovey was the agent or employee of Meredith. It is now urged that there should have been a directed verdict in favor of Meredith and his testimony ruled admissible on all issues. The evidence shows that Meredith and Hovey obtained some public address equipment in Springfield for use of Meredith in his revival meetings in Petersburg, and placed it in the car, that Meredith was not paying for the trip, and that he rode in the rear seat with some of the equipment. The evidence, although slight, was sufficient for the court to deny the motion for directed verdict and to submit the issue to the jury.

Error is assigned in the giving and refusing of instructions. Plaintiff tendered at least 37 instructions of which 33 were given, some of which were unduly lengthy,

but defined all of the issues and the law applicable thereto. On behalf of defendants and counter-claimants, 14 instructions were given, including several as to forms of verdict. There is some confusion in the record as to which party tendered certain instructions. As in almost all cases, fault may be found with some instructions, but in this case we believe the jury was fully and fairly instructed as to the issues and applicable principles of law. The answering of six special interrogatories by the jury, the returning of three guilty verdicts, the returning of three not guilty verdicts, and the rejection by the jury of eight other forms of verdict, without any conflict or inconsistency, certainly tends to indicate that the jury was not confused or misled by the instructions.

Finding no reversible error in the giving or refusing of instructions, or in the orders denying motions for judgments notwithstanding the verdicts, and orders denying motions for new trial, the judgment of the Circuit Court of Menard County is affirmed.

Affirmed.

Abstract

STATE OF ILLINOIS

APPELLATE COURT

THIRD DISTRICT

October Term, A.D. 1948

General No. 9607

Agenda No. 7

JOHN H. STEARINGEN,
Plaintiff-Appellee,
vs.
JOSEPH MCGOVERN,
Defendant-Appellant.)

Appeal from
County Court of
McLean County.

335 I.A. 364²

Wheat, J.

In this action for damages, based upon assault and battery, a jury awarded plaintiff \$200 for actual damages and \$250 for punitive damages. Upon judgment being entered by the court and motion for new trial being denied, defendant appeals.

The only alleged error argued on appeal is that the court erred in giving plaintiff's instructions 4 and 5. The latter part of instruction 5 is as follows:

" * * * You are instructed that if you find that the plaintiff sustained the injuries aforesaid at the hands of the defendant and that the assault upon the plaintiff was willful and wanton, you will have the right, and it will be your duty, to award the plaintiff not only sufficient damages to compensate him for the actual monetary loss he has sustained, but also to award the plaintiff a sufficient sum of money as punitive damages to deter the defendant in the future from injuring the plaintiff or other persons."

Instruction 4 is similar. It is said that both instructions are erroneous in that they tell the jury that it would be

their duty to assess punitive damages in the event they found the act willful and wanton, it being urged that the instructions should do no more than to tell the jury that the assessment of punitive damages was permissive under certain circumstances.

In support of this position, defendant cites the case of ^{Chicago North Western} C. & N. W. Ry. Co. v. Chisholm, Jr., 79 Ill. 584, wherein the court said:

"The jury were told, if they find certain facts to exist, they were at liberty, and it was their duty, to assess damages. It was the province of the jury to determine whether the plaintiff had been damaged, and the amount, and in the discharge of this duty they should have been left free and untrammelled. It was proper for the court to say, in the instruction, that they may, might or were at liberty to assess damages; but when the court went one step further, and said it was their duty, this was a clear invasion upon the rights possessed by the jury, which we can not sanction."

In the case of Consolidated Coal Co. ^{of St. Louis} v. Maenni, 146 Ill. 614, in discussing a similar instruction, the court said:

"It is urged, as an objection to this instruction, that it asserts it to be the duty of the jury to assess the plaintiff's damages, etc. In support of the objection the cases of C. & N. W. Ry. Co. v. Chisholm, Jr., 79 Ill. 584, and City of Peoria v. Simpson, 110 Id. 294, are cited. * * * The doctrine of the Chisholm and Simpson cases, as above stated, needs, however, to be so modified as to be limited in its application to cases where, under the facts, the jury would be justified in allowing exemplary damages. * * * The province of the jury in determining the allowance of the punitive damages would be too much invaded if they were instructed that it was their duty to allow such damages, instead of being told that they might allow them, or were at liberty to allow them."

In the case of City of Salem v. Webster, 192 Ill. 369, involving ordinary negligence, in discussing a similar instruction, the court said:

THE FIRST OF THESE TWO BOOKS IS A HISTORY OF THE
CITY OF NEW YORK, FROM ITS FOUNDATION TO THE
PRESENT TIME. THE SECOND IS A HISTORY OF THE
STATE OF NEW YORK, FROM ITS FOUNDATION TO THE
PRESENT TIME. THE FIRST BOOK IS A HISTORY OF THE
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STATE OF NEW YORK, FROM ITS FOUNDATION TO THE
PRESENT TIME.

"Complaint is also made of the last clause of the instruction, which required the jury, if they found for the plaintiff, to assess his damages at such amount as the evidence showed would compensate him for his injuries. It is argued that the instruction should be only permissive in that respect. Where exemplary damages are recoverable it is error to give such a direction, but in this case only compensatory damages could be recovered, and the direction related only to such damages. The instruction was not erroneous in that respect."

From a consideration of the above, no other conclusion can be reached than that the giving of plaintiff's instructions 4 and 5 constitute reversible error, by reason of which the court should have granted a new trial. The cause is reversed and remanded to the County Court of McLean County for a new trial.

Reversed and remanded.

Complaint is also made of the lack of the
instructions, which required the jury, at that time,
for the plaintiff, to return the damages of such
amount as the witness would estimate to be
for his injury. It is argued that the instruction
should be left tentative in that respect. There
is no reason why the instruction should be
given such a direction, but in this case any
jury damages could be recovered, and the plaintiff
related only to what happened. The instruction was
not erroneous in that respect.

From a consideration of the above, no error appears
and he requested that the award of plaintiff's damages
be affirmed and a certificate reversible error, he requested that
the award should have granted a new trial. The court is
reversed and remanded to the County Court to grant a new
trial.

Reversed and remanded.

JOHN BALASKAS and
HENRY THOMAS,
Appellees,

v.

VICTOR S. PETERS,
Defendant.

APPEAL FROM CIRCUIT COURT,
COOK COUNTY.

Appeal of ANDERSON PLOTZ
& COMPANY, Inc., a corpo-
ration,
Appellant.

713
335 I.A. 565

THE

MR. PRESIDING JUSTICE FEINBERG DELIVERED OPINION OF THE COURT.

Plaintiffs filed their complaint against defendant Peters, for specific performance of an alleged contract of purchase of certain special assessment bonds and vouchers for the price of \$7792. Anderson Plotz & Company, Inc. was given leave to intervene, and by its intervening petition alleged that it was the purchaser of the same bonds and vouchers from defendant Peters, and that it was entitled to a decree of specific performance against Peters. It also filed an answer to the complaint, which in substance denied plaintiffs' right to a decree for specific performance. Defendant Peters moved to strike the complaint, which was allowed. Thereafter an amended complaint was filed to meet the objections made to the original complaint, the principal objection being that the complaint on its face showed that the Statute of Frauds (Ill. Rev. Stat., 1947, chap. 121-1/2, §4) barred the plaintiffs' right of recovery, because there was no memorandum or writing signed by defendant, or his authorized agent, to satisfy the requirements of the Statute.

The cause was referred to a master, who recommended a decree for complainants. Intervening petitioner and defendant filed their exceptions. They were overruled by the chancellor, and a decree was entered in favor of complainants for specific performance against defendant Peters, and dismissing the intervening petition for want of equity. From this decree intervening petitioner appeals. Defendant Peters did not appeal.

The original complaint alleged that defendant entered into a verbal contract with plaintiffs on April 6, 1944, for the sale of said bonds and vouchers at the price of \$7792. The intervening petition alleged that defendant employed one Simeon Markman to sell the securities in question; that on April 6, 1944, defendant, through Markman, sold to petitioner the securities for \$7792; that a written confirmation was given to petitioner by Markman, under the same date; that said sale was confirmed in writing by letter of April 6, 1944, from Markman to Peters, which in substance stated that the letter was to confirm the telephone conversation between them concerning the sale of the securities "at a price of 40¢ flat, less 1 point to the writer for selling same, net to you 39¢ flat," and to arrange to deliver them at the City National Bank and Trust Company on Monday, April 10, 1944; that defendant wrote Markman a letter, dated April 7, as follows: "In reply to your letter of April 6th, 1944, wherein you informed the undersigned that you have sold the vouchers pertaining to the above warrant for 40¢ flat, less one point selling commission to you, making the net price to us 39¢ flat, we will be pleased to deliver the said vouchers to the City National Bank and Trust Co., LaSalle and Adams Street, on April 10, 1944, providing the said bank will be authorized to pay us the money upon delivery of the said vouchers, on or before April 10, 1944;" that pursuant to the arrangement, petitioner deposited on April 10, 1944, at the City National Bank, \$7792, the purchase price of said securities, with instructions to pay the same to defendant upon his delivery of the securities to the bank; that defendant failed to deliver said securities, and that petitioner stands ready, willing and able to accept the said securities and pay the said purchase price.

After the original complaint was stricken, and with the intervening petition on file, revealing the confirmatory letters, plaintiffs filed an amended complaint in which for

The first thing I noticed when I stepped out of the car was the cold. It was a sharp contrast to the warm blanket of the car's interior. I shivered slightly, pulling my coat tighter around me. The air was crisp and clear, a welcome change from the stuffy atmosphere of the city. I took a deep breath, savoring the freshness. The sun was shining brightly, casting long shadows on the pavement. I walked briskly, my mind racing with thoughts of the day ahead. The city was bustling with life, the sounds of traffic and the chatter of people filling the air. I felt a sense of purpose, a determination to make the most of this day. As I walked, I noticed the familiar sights and smells of the city. The aroma of coffee from a nearby cafe drifted towards me, making me hungry. I glanced at my watch, noting the time. It was still early, but I knew I had a lot to do. I continued my walk, my steps confident and sure. The city was my playground, and I was ready to explore every corner. I felt a sense of freedom, a release from the constraints of my daily routine. The world was my oyster, and I was ready to taste it all. I walked on, my heart full and my mind clear. The day was young, and I was ready to embrace it all.

the first time they alleged that plaintiffs, through their attorney, James Percival Pio, employed one Simeon K. Markman to negotiate with defendant Peters the purchase of said securities; that the sale of said securities to plaintiffs, through their agent Markman, was confirmed in writing. Made a part of said amended complaint are the same letters embodied in the intervening petition.

Plaintiffs tried their cause upon the theory that Markman was the agent of the plaintiffs for the purchase of these securities, and, therefore the confirmatory letters referred to satisfied the requirements of the Statute of Frauds. Attorney Pio filed the complaint, appeared actively in the case and did not formally withdraw his appearance as attorney of record for the plaintiffs until February 21, 1947. He must have known in the preparation of the case for trial, that he would be the only witness to establish the employment by him of Markman as the agent for plaintiffs; that plaintiffs had no negotiations with Markman leading to the purchase of such securities, and that all of the dealings were had by Pio, as their representative.

Upon the trial of the cause, Pio was the only witness to establish the alleged employment by him of Markman. Plaintiffs are not named or referred to in the confirmatory letters. Pio's testimony upon this subject becomes an important factor in determining whether or not the master's report and the decree confirming it are against the manifest weight of the evidence.

When the hearing started before the master on August 1, 1945, Pio made the following statement: "I originally appeared as attorney for plaintiffs, but it developed I would have to be a witness so Mr. Gladstone is representing the plaintiffs." He was then sworn and testified for plaintiffs. Notwithstanding the announcement that Mr. Gladstone would represent the plaintiffs, the record discloses that in the several hearings before the master, on September 7, and September 11, 1945,

March 7, and May 29, 1946, and January 3, 1947, "James Percival Pio and Myer H. Gladstone appeared on behalf of the plaintiffs." A lawyer who will ignore the admonition of our Supreme Court repeated in so many cases, McKey v. McKean, 384 Ill. 112, and cases there cited, cannot now complain if this court will refuse to give any credit to his testimony. In McKey v. McKean, at p. 122, the Supreme Court in a similar situation said:

"* * * It must have been as apparent to him when he dictated the complaint that he believed his testimony would be material, as when he took the witness stand. Immediately upon that fact becoming evident, it was his duty to then determine whether or not he would be a witness in the cause, and if he was to testify, he should at that time have entirely severed his connection from the litigation. If the conclusion was that he should not testify, he and his client should have abided by that decision, unless some emergency thereafter arose which could not be anticipated, making it important for the protection of his client's interest that he should testify. (Onstott v. Edel, 232 Ill. 201.) This practice has been repeatedly condemned by this court. The testimony of an attorney in a case under such circumstances is entitled to little or no weight or credit."

At p. 121, the court said:

"True, he purported to withdraw as an attorney in the case a few minutes before he appeared as a witness. The record shows that he has since actively continued as an attorney, if not the principal attorney, in the case up to the present time. This withdrawal was only temporary and nominal. It was not bona fide or made in good faith."

The master, in reaching his conclusions, and the chancellor, in entering the decree with the specific finding that Markman was the agent of Pio, had to rely upon the latter's testimony to establish the employment of Markman, and in doing so, ignored the rule laid down by our Supreme Court applicable to such testimony. Without Pio's testimony, there is not sufficient evidence in the record to establish that Markman was the agent of the plaintiffs. The confirmatory letters, therefore, were not to an agent for the plaintiffs, and plaintiffs had no writing or memorandum to meet the requirements of the Statute of Frauds.

On the other hand, the confirmatory letters support the position taken by the intervening petitioner that Markman was the agent of defendant Peters, and as such agent, sold these bonds to the intervening petitioner. That Markman was

the agent of Peters is borne out by the letter of Markman of April 6 to Peters, and the letter of Peters, dated April 7, to Markman. Peters would not be expected or obligated to pay a commission to Markman unless Markman was his agent. In addition we have the written order from the intervening petitioner to Markman, dated April 6, in which it confirms the purchase of the securities in question at the price stated, and the confirmatory letter of April 6, 1944, from Markman to the intervening petitioner, in which he says: "I have your confirmation of April 6th, 1944, with reference to your purchase of the following City of Chicago Special Assessment Vouchers [itemizing them] at 40 cents flat. Mr. Peters, my principal, is confirming by letter tomorrow his verbal confirmation of today authorizing my sale of these securities. I will advise Mr. Peters to deliver these securities to the Special Service Window at the City National Bank & Trust Co., Chicago, on Monday, April 10th, 1944. Thanking you for your order, I am, Very truly yours, Simeon K. Markman."

It stands uncontradicted in the record, that defendant's letter of confirmation, dated April 7, to Markman, was in the possession of and the property of the intervening petitioner, and not shown to have been in the possession of Pio at any time. It is reasonable to assume that if Pio had employed Markman as plaintiffs' agent, and had known of these confirmatory letters before they were disclosed in the intervening petition, he would have required Markman to turn over the letters or copies of them to him.

We are convinced from a review of all of the credible evidence, that the intervening petitioner fully established its claim of purchase of the securities in question and the sale to it by Peters through Markman, and that it is entitled to a decree for specific performance.

Plaintiffs argue that since Peters did not appeal from the decree, the finding in the decree that Markman was the

agent of complainants is binding, and that the intervening petitioner cannot attack that finding. We cannot agree with this contention. Even one who is not a party to a proceeding, but appears to be directly affected by the judgment or decree entered, may appeal under section 205, chapter 110, Ill. Rev. Stat. 1947. Certainly the intervenor, who is a party to the proceedings and directly affected by the decree containing findings that are adverse to its interests, is entitled to appeal from it. Harrison v. Kamp, 395 Ill., 11, at p. 18.

The decree of the Circuit Court is reversed and the cause remanded with directions to enter a decree for the intervening petitioner in harmony with the views herein expressed.

DECREE REVERSED AND THE CAUSE
REMANDED WITH DIRECTIONS.

Tuohy and Niemeyer, JJ., concur.

JOSEPH G. ENGERT, as Trustee,
Appellee,

v.

CHICAGO TITLE AND TRUST COMPANY,
a corporation, as Trustee under
Trust No. 33300, et al.,
Defendants,

GEORGE D. POULAKIDAS,
Appellant.

APPEAL FROM SUPERIOR
COURT, COOK COUNTY.

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335 I.A. 366'

MR. PRESIDING JUSTICE FEINBERG DELIVERED THE OPINION OF THE COURT.

Defendant appeals from a decree of foreclosure of a junior mortgage executed by the Chicago Title and Trust Company, as trustee, to secure a note signed by it as trustee, for the principal sum of \$5,500. The decree allowed \$350 attorneys' fees for the complainant. An answer to the complaint was filed by the defendant trustee, and a default was entered as to the other defendants, some of whom were designated as "Unknown Owners and Holders of Beneficial Interest Certificates of Chicago Title and Trust Company, under Trust No. 33300, and Unknown Owners."

The cause was referred to a master, who made his report, recommending a decree of foreclosure for the complainants and finding the amount due the complainant to be \$5,888.61, including interest on principal and unpaid installments, and attorneys' fees and costs amounting to \$543.46, or a total of \$6,432.07. Before the start of the master's hearing, defendant Poulakidas served written notice on the plaintiff that he would rely upon the defense of usury under the statute. Notice was given pursuant to §7, ch. 74, Ill. Rev. Stat. 1947. The propriety of the notice has not been questioned. Defendant appeared upon the master's hearing and was allowed to testify in his own behalf. After exceptions to the report were overruled by the chancellor, the decree was entered.

It appears clearly from the evidence that plaintiff, at the time of this transaction, and the attorneys for the complain-



ant were partners in a finance company known as Northwestern Finance Company; that the finance company, plaintiff, and the attorneys for plaintiff occupied offices in the same suite; that in response to an advertisement of the finance company, defendant Poulakidas applied to plaintiff for a loan; that as a result of negotiations between defendant and plaintiff, a check was issued by the Northwestern Finance Company for \$4,675, payable to the Chicago Title and Trust Company, as trustee, which in turn executed its note and junior mortgage for \$5,500 at the request of defendant Poulakidas; that as a part of the transaction, plaintiff had Poulakidas and his wife guarantee payment of the note.

That defendant Poulakidas and his wife were the holders of the beneficial certificates of interest in the real estate in question, title to which defendant Title and Trust Company held as trustee, is undisputed. Plaintiff had all of his transactions and negotiations with defendant Poulakidas and not with the Title and Trust Company. The Trust Company was a mere naked trustee in this instance.

Plaintiff admitted in his testimony that he knew the amount of \$825, included in the principal note, was a usurious charge and not sanctioned by law. He admitted that the payment made to the Chicago Title and Trust Company for the note and mortgage was by check of the Northwestern Finance Company, but claimed that later he replaced the amount of the check with his personal funds, and had merely borrowed the amount from the finance company, and that, therefore, the attorneys for plaintiff, who were his partners in the finance company, had no interest in this loan.

It is the contention of plaintiff that since the note is executed by the Title and Trust Company, as trustee, under the usury statute, neither the corporation nor the holders of the beneficial certificates may avail themselves of the defense of usury. This contention we deem without merit. The trustee did

not obtain the money for its corporate purpose or use. It merely acted as a naked trustee. The transaction was for the benefit of defendant Poulakidas, which the plaintiff well knew. Equity, looking behind the mere form of the transaction, must find that Poulakidas in reality is the debtor, and not the corporate trustee. Under the usury statute (§§4, 5 and 6, ch. 74, Ill. Rev. Stat. 1947) plaintiff forfeits all claim to interest, which makes the principal amount due \$4,675.

All the notices to Poulakidas for payment were on the stationery of the finance company; and the later claim made by plaintiff, that he replaced the amount represented by the finance company's check to the corporate trustee, is not convincing. The conclusion we are compelled to reach is that the transaction originating with the finance company was financed by the partnership funds, and the note and mortgage belonged to the finance company. The allowance, therefore, of attorneys' fees to plaintiff's attorneys of record was improper. Stein v. Kaun, 244 Ill. 32 at p. 38. The testimony of one of the attorneys of record, Samuel L. Rosenblatt, must be given little or no credit whatever. McKey v. McKean, 384 Ill. 112.

The decree of the Superior Court is reversed and the cause remanded with directions to enter a decree for the complainant for the principal sum of \$4675, without interest and without allowance for attorneys' fees, and for further proceedings in conformity with the views herein expressed.

REVERSED AND REMANDED WITH DIRECTIONS.

Tuohy and Niemeyer, JJ., concur.



44472

WILLIAM J. WHITE and GERALDINE WHITE,
Appellees,

v.

MILDRED BRISCOE and JAMES H. BRISCOE,
Appellants.

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

335 I.A. 366²

MR. PRESIDING JUSTICE FEINBERG DELIVERED THE OPINION OF THE COURT.

From a judgment for \$100 in favor of plaintiffs, against defendants, entered in the Municipal Court of Chicago in an action for malicious prosecution, tried without a jury, defendants appeal. Plaintiffs have made no appearance upon this appeal.

It appears from the record that plaintiffs and defendants lived in the same rooming house; that an altercation occurred between the plaintiffs and defendant Mildred Briscoe, resulting from defendant Mildred Briscoe being locked out by plaintiffs. It also appears that there had been previous arguments between the parties, and on this occasion defendant Mildred Briscoe called the police. In the presence of the police, defendant Mildred Briscoe accused plaintiffs of making threats against her, and when plaintiff William White was informed he was to be arrested, his wife Geraldine created a disturbance in the presence of the police. The police arrested plaintiffs and requested defendant Mildred Briscoe to go to the station and sign the complaint, which she did. Her husband, James Briscoe, did not sign any complaint.

We are convinced from this record that plaintiffs wholly failed to prove two necessary requirements in malicious prosecution: (1) want of probable cause, and (2) malice. McElroy v. Catholic Press Co., 254 Ill. 290; Glenn v. Lawrence, 280 Ill. 581.

The judgment of the Municipal Court is reversed.

REVERSED.

Tuohy and Niemeyer, JJ., concur.



BENJAMIN KRISTY,

Appellee,

v.

EAGLE INDEMNITY CO., a corporation,
and FEDERAL UNION INSURANCE CO., a
corporation,

Appellants.

APPEAL FROM MUNICIPAL

COURT OF CHICAGO

3351.A. 567'

MR. JUSTICE NIEMEYER DELIVERED THE OPINION OF THE COURT.

Defendants appeal from a judgment for \$625 entered in an action on an insurance policy covering plaintiff's automobile truck under which defendants were obligated "Coverage G--Theft (Broad Form) To pay for loss of or damage to the automobile, hereinafter called loss, caused by theft, larceny, robbery or pilferage," subject, however, to the provision under "Exclusions" that "This policy does not apply *** (m) under coverages D and G, to loss due to conversion, embezzlement or secretion by any person in lawful possession of the automobile under a bailment lease, conditional sale, mortgage or other encumbrance." The stealing of the truck is admitted and the sole defense is that the theft was committed by a bailee lawfully in possession of the truck and that such loss is not covered by the policy. The bailment of the truck is a controverted question of fact which defendants sought to prove by alleged statements signed by plaintiff but claimed by him on the trial to have been altered after his signature. A question of fact was presented which justified the refusal of the court to direct a verdict or enter a judgment for defendants notwithstanding the verdict, and the state of the evidence is such that the court was warranted in refusing to grant a new trial on the ground that the verdict was against the weight of the evidence. As the judgment must be reversed and the cause remanded for a new trial because of error in the giving and refusing of instructions, we do not review the evidence.

On behalf of plaintiff the court instructed the jury that if they believed "that said policy of insurance covered the truck of the plaintiff and was in full force and effect at the time the truck of the plaintiff was stolen," the verdict should be for the plaintiff. This instruction ignored the defense that the theft was committed by a bailee of the truck, and the giving of it was error.

By another instruction the jury was told that certain facts would constitute a waiver of the necessity of furnishing proof of loss - a question not raised by defendant and therefore improperly injected into the case. Geiselman v. Strubhar, 302 Ill. App. 23, 25. By other instructions the jury was told that if it found any ambiguity in the terms of the insurance policy, all presumptions must be indulged in favor of the plaintiff and against the defendants and that the policy was to be construed liberally in favor of the insured and strictly against the defendants. The construction of the contract was a matter of law, to be determined by the trial court and not by the jury. These instructions were erroneous.

Plaintiff contended that the refusal of defendants to pay his claim under the policy was vexatious and without reasonable cause, and the jury was instructed that section 155 of the Insurance Code (Ill. Rev. Stat. 1947, chap. 73, par. 767) authorizing the court under such circumstances to allow "reasonable attorney fees, as a part of the taxable costs in the action and in addition to all other costs" (not exceeding 25 per cent of the amount to which plaintiff was entitled to recover against the insurance companies), was applicable. Liability of defendants for theft was limited to \$500, and the verdict and judgment for \$625 included 25 per cent of defendants' total liability. Under the language of the statute, and as held in Stewart v. Guarantee Trust Life Ins. Co., 321 Ill. App. 588, the allowance of attorneys' fees is vested in the court and not the jury, and the instruction therefore is improper.

Objection is also made to the giving of an instruction "that the burden of proof as to any risk or cost which is specifically excepted in the policy is upon the defendants." This instruction had application to the defense that the automobile was stolen by a bailee - a theft excepted from the general liability of defendants by sub-paragraph (m) under "Exclusions," heretofore quoted. As stated in 29 Am. Jur., Insurance, sec. 1444, "The principle generally applied by the courts is that if proof is made of a loss apparently within a contract of insurance, the burden is upon the insurer to prove that the loss arose from a cause of loss which is excepted...." Supporting this statement are Fidelity & Casualty Co. v. Sittig, 181 Ill. 111, Nalty v. Federal Casualty Co., 245 Ill. App. 180, Rogers v. Prudential Ins. Co., 270 Ill. App. 515, Dietz v. Metropolitan Life Ins. Co., 305 Ill. App. 507, and Goldfarb v. Maryland Casualty Co., 311 Ill. App. 568. The instruction was properly given.

Defendants' refused instructions 1 and 2, defining "bailment" and telling the jury that "if you find from the evidence that the auto truck in question was secreted or taken by Edward Lasure while said Edward Lasure was in lawful possession of the auto truck under a bailment lease, then in that event, you will find the defendant not guilty," should have been given.

The judgment is reversed and the cause remanded for a new trial.

REVERSED AND REMANDED.

Feinberg, P. J., and Tuohy, J., concur.

44473

CITY OF CHICAGO, a Municipal
Corporation,
Appellee,

v.

ELIZABETH GILBERT,
Appellant.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO

3351.A. 567²

MR. JUSTICE NIEMEYER DELIVERED THE OPINION OF THE COURT.

This appeal by defendant from a judgment finding her guilty of keeping a disorderly house, in violation of an ordinance of the City of Chicago, and assessing a fine of \$200, comes to us on a very confusing record. It shows the impaneling and swearing of twelve jurors to try the defendant on March 24, 1948, a trial on that date with a verdict finding defendant guilty, signed by all the jurors impaneled and sworn in the case except Catherine Brown and Eleanor Westenberg, and signed by Catherine Haldase and Elmer Westenberg, who are not shown to have been impaneled and sworn to try the case. On April 6, 1948 defendant's motion for a new trial was overruled, and immediately following this order is a recital of the return of a verdict of guilty and an assessment of a fine of \$200, and of judgment on the verdict. No attempt has been made to correct the record. It is apparent that the verdict returned on March 24, 1948 was not signed by all the jurors sworn to try the cause, and the judgment entered thereon was erroneous. It was not vacated and a motion for a new trial was overruled. If the second recital of a return of the verdict and judgment is merely a repetition of the prior entries, which we assume it was, and a second trial was not actually had, the errors in the first judgment are not corrected. If a second trial

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was had, the judgment therein is erroneous.

The judgment, therefore, is reversed and the cause remanded for a new trial.

REVERSED AND REMANDED.

Feinberg, P. J., and Tuohy, J., concur.

44474

CITY OF CHICAGO, a Municipal
Corporation,
Appellee,

v.

ELIZABETH GILBERT,
Appellant.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO

335 I.A. 568¹

MR. JUSTICE NIEMEYER DELIVERED THE OPINION OF THE COURT.

This appeal is by the defendant appealing in case No. 44473, and the record before us is equally confusing. The charge in this case is, selling intoxicating liquor without a license, in violation of an ordinance of the City of Chicago, and a judgment was entered March 24, 1948 on a verdict finding defendant guilty. The verdict is not signed by all the jurors shown to have been impaneled and sworn to try the case. It is signed by Catherine Haldare and Richard C. Johnson, who are not shown to have been impaneled and sworn in the case. The record then shows the overruling of defendant's motion for a new trial and the entry of a second judgment on April 6, 1948, as in the first case. No attempt was made to correct the record. What we said in the former case governs this case.

The judgment is reversed and the cause remanded for a new trial.

REVERSED AND REMANDED.

Feinberg, P. J., and Tuohy, J., concur.

SOPHIE MARNIK, et al.,
Appellants,

v.

NORTHWESTERN PACKING CO., et al.,
Appellees.

APPEAL FROM SUPERIOR
COURT COOK COUNTY

335 I.A. 568²

MR. JUSTICE NIEMEYER DELIVERED THE OPINION OF THE COURT.

Plaintiffs appeal to the Supreme court from a decree dismissing for want of equity their complaint asking the rescission of sales of shares of the capital stock and mortgage notes of the Northwestern Packing Co., and further relief dependent on such rescission, was transferred to this court. (400 Ill. 66.)

In February, 1920, Anthony Marnik and the defendant Joseph Cyze, who had been engaged as equal partners in manufacturing, buying and selling meat products, organized the Northwestern Packing Co. (hereafter called the corporation), each owning and controlling one-half of the 700 shares of the common stock of the corporation. Marnik died August 21, 1941, leaving the plaintiffs - Sophie his widow, and their children Jean, Anton and Raymond his only heirs at law. At that time 99 shares of stock were registered in the name of Anthony Marnik, 250 shares were owned by Sophie Marnik, individually, and one share was held by a nominee. Sophie Marnik also owned first mortgage notes aggregating \$25,000 issued by the corporation. Cyze owned a like amount. These notes had matured August 10, 1938. In October, 1941, after negotiations between Cyze, Raymond Marnik and S. A. Murray, the attorney representing Sophie Marnik, individually and as administratrix of the estate of her deceased husband, Cyze purchased the Marnik stock, paying \$7,000 for the 250 shares owned by Sophie Marnik and \$3,000 for the 99 shares belonging to the estate, an order of the Probate court of Cook

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county having been obtained authorizing the sale at that price. In 1942 a foreclosure suit and an action at law on the mortgage notes were instituted. Thereafter, through negotiations between the attorneys the notes were sold to Cyze for \$13,000 and the two suits were dismissed.

In January, 1944, plaintiffs brought this action against the corporation, Cyze, his wife and brother, and Louis V. Zralek who was later dismissed out of the proceeding, alleging in the original complaint that a fiduciary relation existed between Sophie Marnik and Cyze; that he, in violation of the trust and confidence reposed in him, made false representations with respect to the financial condition of the corporation, thereby inducing plaintiffs to sell the stock and mortgage notes at grossly inadequate prices. By an amendment plaintiffs charge that alleged loans of corporate funds in excess of \$30,000 to Cyze constituted waste of the corporate funds and gross mismanagement, and asked the appointment of a liquidating receiver for the corporation, as provided by the Business Corporation Act. (Ill. Rev. Stat. 1947, chap. 32, par. 157.86, 87.) Defendants denied the material allegations of the complaint. After extended hearings before a master, who recommended dismissal of the complaint for want of equity, the court approved the master's report and dismissed the complaint.

Financial statements produced by plaintiffs show that, notwithstanding drastic reductions in salaries paid Marnik and Cyze, the corporation operated at a loss from 1932 through 1941; that it operated at a loss before deducting officers' salaries, from 1936 through 1941. There is testimony that in 1940 Marnik offered to sell the Marnik stock for \$10,000, and ~~an~~ an undertaking on the part of the purchaser to pay the mortgage notes within five years. Isaac Wagner, an accountant whose firm had audited the books of the corporation since 1920, testified that in June 1941, at the request of Marnik, he had an attorney prepare a contract for the sale of the Marnik stock to Cyze for

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\$10,000, Marnik agreeing to procure the extension of the mortgage notes held by Sophie Marnik to August 10, 1946, and a reduction of the interest to 5 per cent; that this contract was not signed because of Marnik's ill health. After Marnik's death negotiations for the sale of the stock were resumed and were conducted by Cyze, Murray and Raymond Marnik. Sophie Marnik testified that she relied on Raymond to look after her interests and relied on his judgment. He had worked for the corporation for ten years as a scaler and salesman. The evidence is in conflict as to his access to the books and his knowledge of the financial condition of the company. It is, however, stipulated that plaintiffs had access to the operating statements and income tax returns of the corporation through and including the year 1940. Raymond testified that Cyze wanted to buy their stock for \$35,000 and told him that the business was bound to go on the rocks; that it had been in very bad financial condition and that his mother would probably not get a like amount if she did not accept the offer; that he believed Cyze and reported the offer and accompanying statements to his mother, who agreed to take \$35,000; that on October 16, 1941 at Murray's office he delivered the stock certificates for 349 shares to Cyze and received checks for \$3,000, \$5,000 and \$2,000, which he delivered to his mother; that Cyze then said in Murray's presence that he was going to sign a \$25,000 note for the balance. Cyze denies the statements attributed to him by Raymond as to the condition of the corporation, etc., and testified that he never had any conversation with anyone to purchase the Marnik stock for \$35,000; that the purchase price was \$10,000 - \$7,000 for the 250 shares and \$3,000 for the 99 shares. Murray testified that shortly before Anthony Marnik's death he talked with him about the sale of the shares of stock; that a copy of the contract Wagner had an attorney prepare was brought to him by one of the Marniks; that after Marnik's death Raymond told him that he was disgusted with the business and

had talked with his mother and she had instructed him to talk with Murray about following up the original conversations that had been held between her husband and Cyze; that they brought in an auditor's report for two years for the purpose of analyzing the assets of the corporation, and renewed negotiations with Cyze; that the stock certificates were delivered to Cyze in his, Murray's office, and Cyze then turned over checks for \$10,000; that there was no conversation about \$25,000 balance to be paid on the stock or about a note for that amount to be executed by Cyze; that all the stock owned by the Marniks was sold for \$10,000; that Raymond never told him that the sales price of the stock was \$35,000. Plaintiffs' exhibits show that Sophie Marnik signed the inventory filed in the estate of her husband in which the 99 shares were valued at \$3,000. These exhibits also show that she signed the petition for authority to sell these shares at that price, stating that she "is fully informed as to the true value of said stock and verily believes that the fair value thereof is the sum of \$3,000." She excuses these valuations by saying that she signed the papers without reading them. Raymond was in the army when the negotiations leading to the sale of the mortgage notes were had. Murray testified that after January, 1942, Cyze first offered \$5,000, then \$7,500 and finally around \$9,000 for the bonds; that feeling they might get more if they instituted a foreclosure suit, they employed Harry A. Blossat, an attorney, who began a foreclosure suit and also an action at law on the notes. After the suits were commenced Murray ceased his activities in respect to the notes. Cyze talked with Sophie Marnik at her home about purchasing the notes. He testified that he told her "things were pretty hard right now with me and I can't meet everything that I took on," and that she said "if you get me \$9,000 I will have the attorneys dismiss that suit"; that he got a \$9,000 cashier's check, which was refused. Sophie Marnik and her daughter Jean testified that when Sophie Marnik refused or was uncertain about

accepting \$9,000 for the notes, Cyze said in substance that business was very bad and he would probably have to close the business; that the "bonds" were paid up and "weren't good." After this conversation the negotiations were conducted by the attorneys. Blossat testified that a few days before September 23, 1942, when the foreclosure suit was set for hearing before the master, he talked with Sophie Marnik, telling her that he felt he could defeat defendant's claim that the notes had been canceled and paid, but that he wanted to have her consider the matter of settlement because if a decree was obtained Cyze would be entitled to one-half of the proceeds of sale after paying the attorney's fees and expenses, and that fact would give Cyze an advantage; that if there was a sale she would have to be prepared to protect her notes; that he asked if she wanted him to talk about settlement and she told him to see what he could do; that he talked with attorneys for defendants - not with the defendants - about a settlement; that he called Sophie Marnik on the phone and told her that he had gotten them up to \$13,000 - one-half in cash and the balance to be secured by the notes. The next day she told him she had decided to accept the offer. The transaction was completed, payments being made by checks to Sophie Marnik. The real estate securing these mortgage notes was valued at \$72,473.42 by witnesses for plaintiffs. This value was based on present cost of reproduction, less depreciation. The foreclosure complaint fixed the value at not more than \$40,000. An appraisal for defendants valued it at \$29,650.

Plaintiffs' first contention is that a fiduciary relation between the plaintiffs (and particularly the plaintiff Sophie Marnik) and the defendant Cyze is admitted by defendants' answer, which neither admits nor denies plaintiffs' allegations as to a fiduciary relation but demands strict proof thereof. Defendants' pleading does not comply with section 40(2) of the Civil Practice

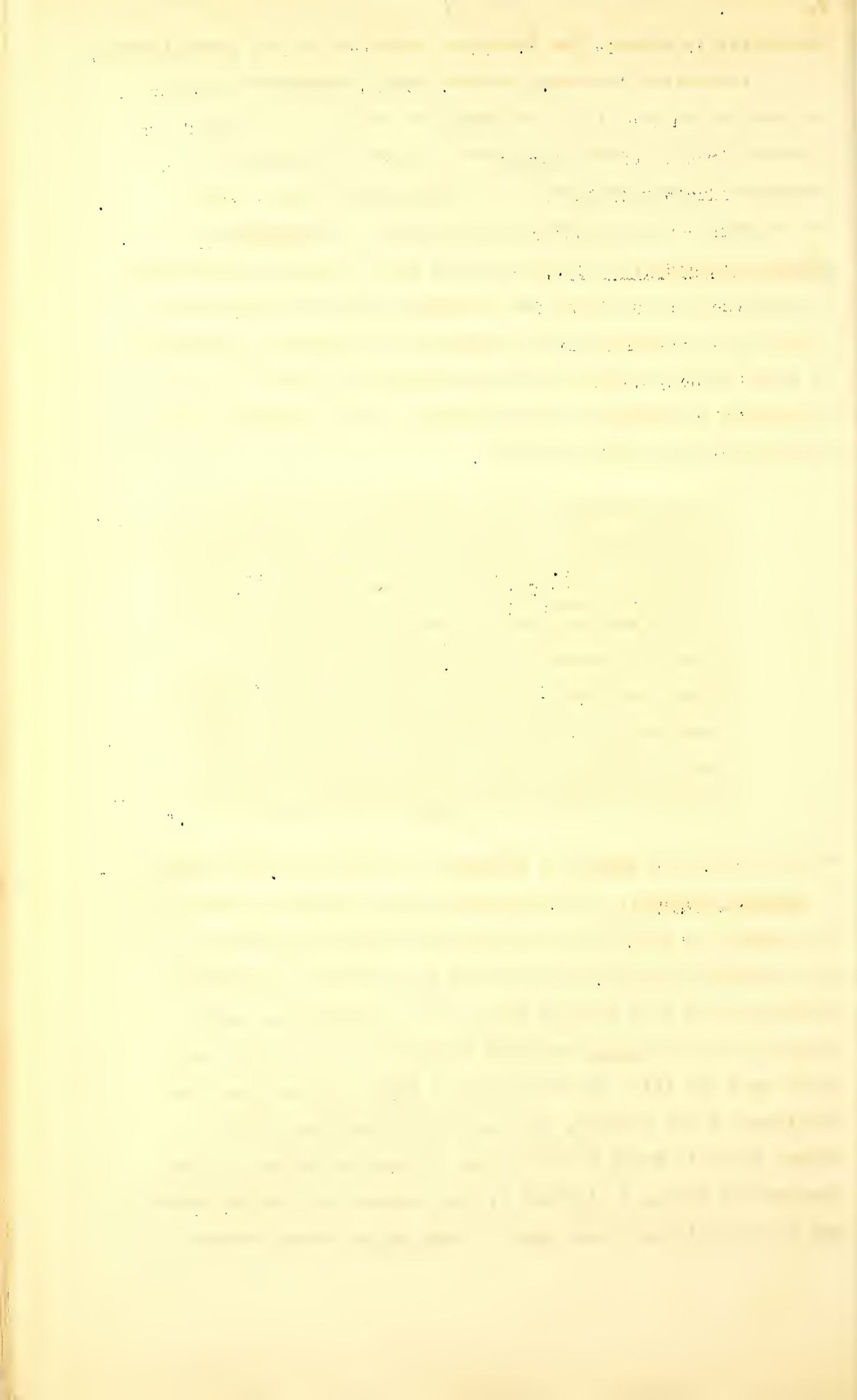
Act, which requires, as to allegations not explicitly denied, a statement in the pleading that the party has no knowledge as to such allegations sufficient to form a belief, supported by an affidavit of the truth of such statement of want of knowledge. Plaintiffs did not object to the defective answer in the trial court and did not take the position there that the fiduciary relation was admitted. The master found that plaintiffs had failed to prove these allegations of their complaint. The sole attack on the finding in plaintiffs' objections and exceptions to the master's report was that it is contrary to the manifest weight of the evidence. The objection to the answer was waived. Sec. 42(2) (3), Civil Practice Act; Department of Finance v. Schmidt, 374 Ill. 351; Slezak v. Flening, 392 Ill. 387; Cienki v. Rusnak, 398 Ill. 77. The burden of establishing the alleged fiduciary relation rested upon the plaintiffs. In Dyblie v. Dyblie, 389 Ill. 326, a contest between brothers, the court said (p. 333): "Its existence (fiduciary relationship) is not dependent upon the establishment of any particular relationship. It involves the idea of trust and confidence and may be found to exist in any legal relationship where special confidence is imposed on one side and domination and influence is on the other. (Seely v. Rowe, 370 Ill. 336.) Where it is sought to establish such a relationship by parol evidence the proof must be clear, convincing, and so strong, unequivocal and ~~unmistakable as to~~ lead to but one conclusion. Bennett v. Hodge, 374 Ill. 326." (Italics ours.) Marnik and Cyze had been in business more than 20 years. The families lived in the same block for more than ten years and, although on friendly terms, Jean Marnik and Cyze testified that they visited each other's home only occasionally. There is no evidence of any business dealings except those between Marnik and Cyze and the two transactions involved herein. No special confidence of plaintiffs in Cyze or domination or influence of Cyze over

plaintiffs is shown. The fiduciary relation was not established.

Plaintiffs, however, contend that, independent of the personal relations of the parties, the position of Cyze as director of the corporation placed on him the duties of a fiduciary in the purchase of the stock and mortgage notes. Our courts do not support this contention. In Hooker v. Midland Steel Co., 215 Ill. 444, the court distinguished between the duties of an official and director as to the business and property of a corporation the management of which is entrusted to them, and the relation of an official and director to an individual stockholder in the purchase of his interest in the corporation, and said (p. 451):

"The management of the business and property of a corporation is entrusted to its officers, and they are empowered to act for the whole body of stockholders. They therefore occupy the position of trustees for the stockholders as a body in respect to such business and property, and cannot have or acquire any personal or pecuniary interest in conflict with their duty as such trustees. A director, however, does not sustain that relation to an individual stockholder with respect to his stock, over which he has no control whatever, but he may deal with an individual stockholder and purchase his stock practically on the same terms as a stranger. In the absence of actual fraud such a purchase will not be set aside for a mere failure to disclose any information the director may have affecting the value of the stock."

To like effect is Bawden v. Taylor, 254 Ill. 464, 467. In Wood v. MacLean Drug Co., 266 Ill. App. 5, the officers and directors who bought the stock of the plaintiff for the corporation, not for themselves, were held obligated to disclose to plaintiff information as to a pending sale of the corporation. After quoting from the Hooker case the language quoted above, the court said (p. 14): "In that case it will be noted that the president of the company, who was a director, individually bought Hooker's stock for himself. He was not acting for the corporation nor as a director of the corporation, and therefore the court held that there was no trust relationship between



them in the transaction. But it will also be noted from the quotation above, that if Beatty was acting as a director of the corporation in the purchase of the stock, there would be a trust relationship between him and Hooker, the stockholder."

Plaintiffs' further claim that the corporation was, in effect, a partnership and that Cyze, as surviving partner, became a trustee for Sophie Harnik as administratrix of the estate of her deceased husband, is without merit.

Plaintiffs having failed to establish a fiduciary relation, were obliged to prove actual fraud by a preponderance of the evidence. The alleged misrepresentations of fact related to the financial condition of the corporation and the alleged payment of the mortgage notes. The master has found against plaintiffs on the charge of fraud and, as the chancellor has approved his report, the findings cannot be set aside unless against the manifest weight of the evidence. Pfaff v. Petrie, 396 Ill. 44. A detailed analysis of the evidence would needlessly extend this opinion. Plaintiffs rely mainly upon the book values to prove the solvency of the corporation and their claim that the stocks and notes were sold at a grossly inadequate price. As said in Ahlenius v. Bunn & Humphreys, 358 Ill. 155, 169: "The use of book values, especially, to measure the value of corporate shares, owing to the multifarious uses for which they are employed, is generally condemned as unsound. ***'Everyone knows that the value of shares in a commercial or manufacturing company depends chiefly on what they will earn, on which balance sheets throw very little light.'" Confirmation of this view is found in the financial statements before us, which show that notwithstanding a continuous operating loss from 1932 through 1941, good-will had been carried as an asset of approximately \$32,000 since 1922. As said in the Ahlenius case (p.168), "....there is no value in the good will of a business which has been a financial failure." There is evidence that the

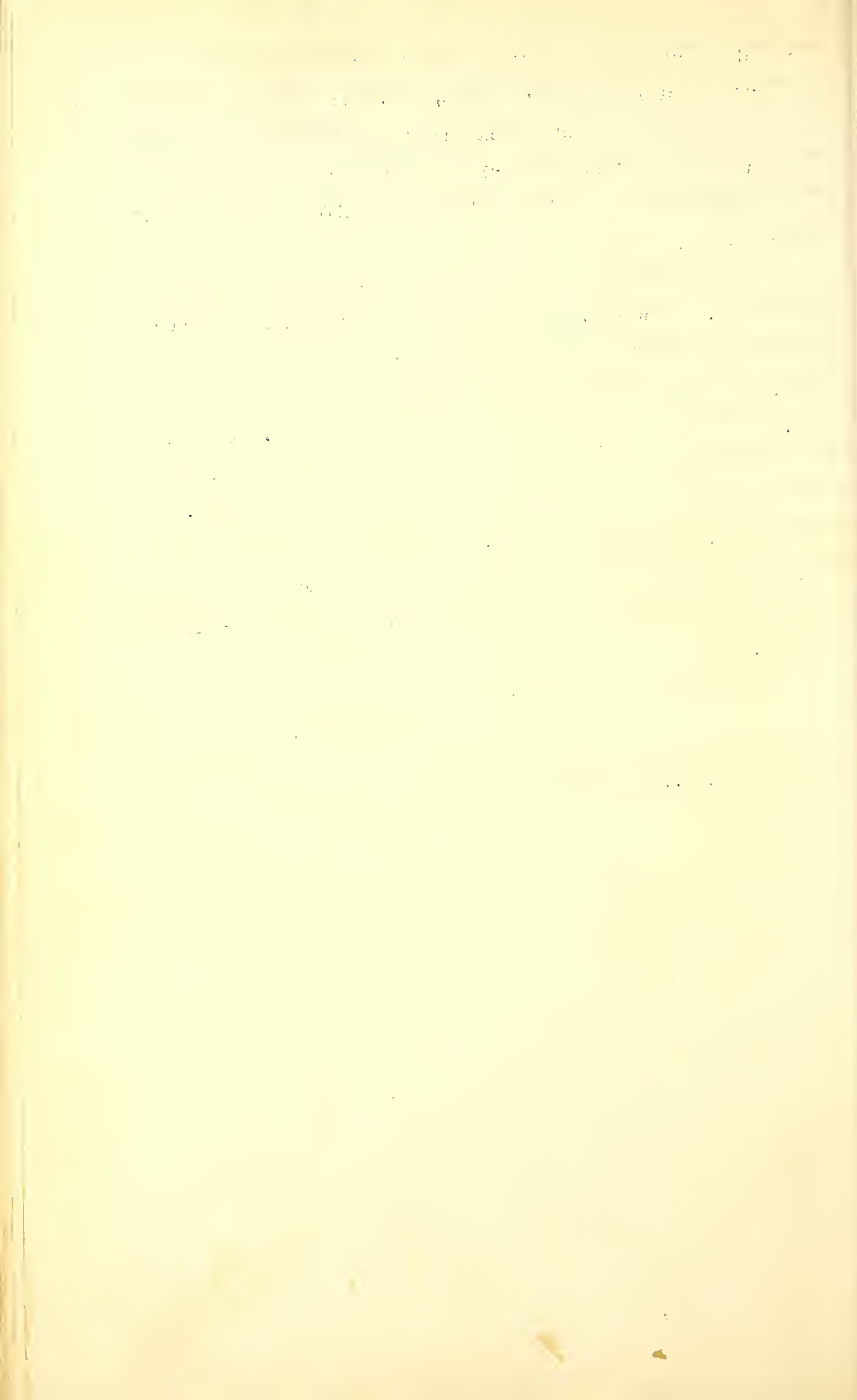
corporation credit was poor; that checks were held because of insufficient funds to meet them, and, that within two months after the purchase of the stock the bank increased the interest rate on a \$15,000 loan from 3-1/2 to 6 per cent. We cannot reverse the decree as being against the manifest weight of the evidence.

The testimony of attorneys Murray and Blossat was not privileged. Murray testified to conversations with his clients giving him authority to conduct negotiations for the sale of the stock, and to conversations with Raymond in the presence of Cyze. Blossat's testimony was of a similar nature. A client who authorizes his attorney to deal with third persons cannot close the mouth of the attorney as to the authority given. Dickerson v. Dickerson, 322 Ill. 492; Koeber v. Somers, 108 Wis. 497. Statements of a client in the presence of the attorney of a third person are not privileged. Lynn v. Lyerle, 113 Ill. 128.

The decree is affirmed.

AFFIRMED.

Feinberg, P. J., and Tuohy, J., concur.



44540

LOUIS MILANI FOODS, INC.,
a corporation,
Appellee,

v.

MURRAY SCHARF et al.

On Appeal of FRANK BERNARD
and BERNARD FOOD INDUSTRIES,
INC., a corporation,
Appellants.

APPEAL FROM SUPERIOR
COURT, COOK COUNTY.

MR. JUSTICE NIEMEYER DELIVERED THE OPINION OF THE COURT.

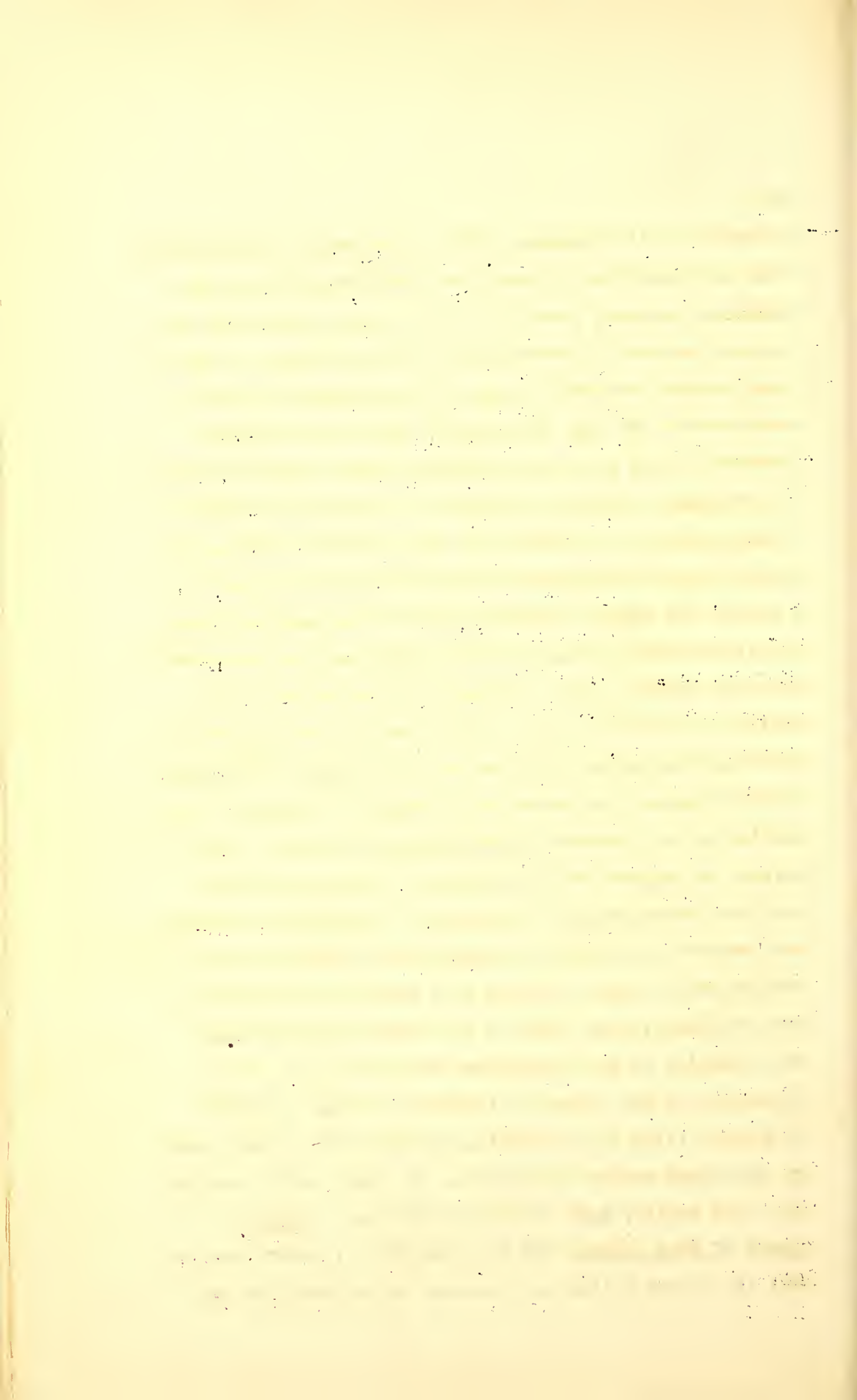
Defendants Frank Bernard and Bernard Food Industries, Inc., a corporation, appeal from an order refusing to dissolve a temporary injunction as modified, on motion of defendants after answer filed.

The complaint was filed March 25, 1948, and a temporary injunction was immediately granted without notice, conditioned on an injunction bond of \$5,000 being approved by the court within five days. On March 30th, on motion to dissolve, the court modified the injunction by striking out paragraphs 1, 2 and 4, and striking out and inserting certain words in paragraph 3, and denied the motion to dissolve the injunction as to paragraph 3 as modified and as to paragraph 5. No appeal was taken from this order.

The injunction as modified and continued in force restrained the defendants, their officers and agents, from "3. Manufacturing, selling, distributing, delivering or offering to the trade any food products prepared from formulas, recipes, processes, or other confidential information acquired by defendants during the term of his employment with plaintiff, or confidential information used by

335 I.A. 569

plaintiff in its business. (5). Disclosing to any person, firm or corporation, directly or indirectly, any of the formulas, recipes, processes or any other information pertaining thereto in possession of the defendants, or any of them, having reference to any of the products presently manufactured and sold by plaintiff and to any dietetic products worked on by the defendant Scharf during his term of employment with the plaintiff." On April 8th there was a substitution of attorneys for the defendant Scharf. On April 15th, on stipulation between Scharf and plaintiff, a decree was entered enjoining Scharf from manufacturing or distributing, etc., any food product made in accordance with any formula, etc., learned by Scharf while in the employ of plaintiff, etc. On the same day the defendants appealing (hereafter referred to as defendants) filed their verified answer with notice of a motion to dissolve "the portion of the temporary injunction not heretofore dissolved, in support of which motion I shall present the verified answer of said defendants." On May 17th defendants' motion to dissolve the injunction as modified was denied and the cause referred to a master in chancery to take testimony, etc. This is the order appealed from. No transcript of the proceedings has been filed. There is nothing in the record to indicate that the affidavit of Scharf, filed on March 30th, was presented to the court on the second motion to dissolve. It could not be used on the first motion, made before answer filed. Dunne v. County of Rock Island, 273 Ill. 53, 56. Plaintiff insists that the second motion was disposed of on complaint and

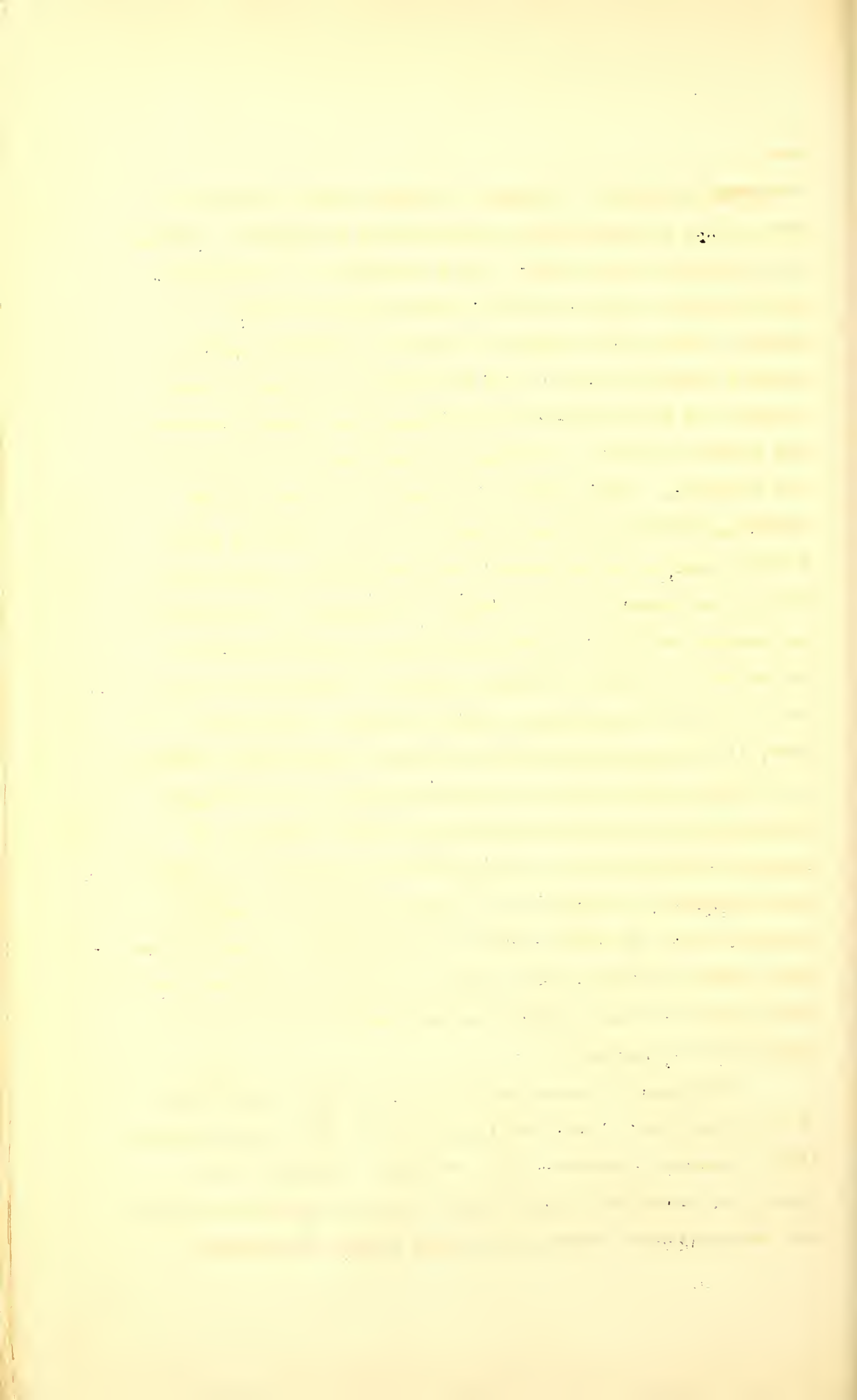


answer. The notice of motion supports this contention. We ignore the affidavit. The answer is not, as defendants contend, to be taken as absolutely true. Dunne v. County of Rock Island, supra.

Plaintiff is, and for a long time has been engaged in the manufacture and sale of food products. Scharf, a chemist, was employed by plaintiff from March 1942 to January 10, 1948, when he left and became associated with the defendant corporation. Plaintiff concedes that no written contract or restrictive covenant is involved in the case. The allegations of the complaint, so far as they are now material, are substantially as follows: Plaintiff markets over 70 food products, many of which were originated by it. It has been heretofore the sole manufacturer of some of them, there being no comparable products sold by competitors. It has spent more than a million dollars in research and experimental work in developing and perfecting new formulas and processes and in advertising its wares. All of plaintiff's formulas, manufacturing recipes and research data are closely guarded trade secrets which are revealed only to a few key executives, and then only on orders to treat them as strictly confidential. January 5, 1947, Scharf was charged with and undertook the complete and sole direction, management and supervision of plaintiff's Chicago plant and offices, in which position and by virtue of his special relationship of trust and confidence to plaintiff he obtained unobstructed access to and personally examined and used the following described confidential and unique property of the plaintiff: Plaintiff's manufacturing

recipes; plaintiff's original research records and data for many years, including 1943 through 1947; plaintiff's laboratory notebooks and records. That pursuant to a conspiracy with Bernard - alleged only on information and belief - Scharf, while in the employ of plaintiff, systematically removed from the premises and possession of plaintiff the records and information last mentioned, made copies thereof and delivered them to defendant corporation, to be used in its business. During 1947, at plaintiff's direction and expense, Scharf worked in plaintiff's laboratory and perfected formulas for dietetic foods, including products free of salt and sugar; that he refused to disclose to plaintiff the results of his research, and when he left plaintiff's employ took with him, without plaintiff's knowledge or consent, all data pertaining to such research. January 12, 1948, in a conversation with an officer of plaintiff, Scharf said that he and Bernard were in possession of all formulas and processes developed by Scharf and other employees of plaintiff during Scharf's employment by plaintiff, and that they intended to continue to use such information, and if plaintiff took any legal action or gave notice of such action they would immediately make copies of all such formulas, recipes, processes and information and send the same to all competitors of plaintiff.

Defendants' answer denies the material allegations of the complaint. Specifically, it denies that any of plaintiff's formulas, recipes, etc., are trade secrets; that Scharf was required by plaintiff, or that he agreed, to treat any information as confidential; that Scharf had complete



and sole control and direction of plaintiff's Chicago plant and offices, or that he had a special relationship of trust and confidence; that any of the property to which Scharf is alleged to have had unobstructed access, etc., constitutes trade secrets or plaintiff's exclusive property; that Scharf removed any of plaintiff's property or copied any of plaintiff's records or delivered any of plaintiff's records or information to the corporate defendant; that Bernard was ever employed by plaintiff; that he is or ever was active in the management or operation of the defendant corporation; that Scharf or Bernard acted in combination or concert. The answer admits that the defendant corporation is manufacturing and distributing food products which are competitive with those sold by plaintiff, but denies that the defendant corporation is using any formulas, recipes or trade secrets which belong to plaintiff; admits that the defendant corporation distributes dietetic foods based on formulas developed by Scharf but denies that such formulas were developed by Scharf while in the plaintiff's employ or that such formulas belong exclusively to plaintiff. In Victor Chemical Works v. Iliff, 299 Ill. 532, plaintiff sought to enjoin Iliff, a former employee, and others, from using in a newly established business certain alleged trade secrets communicated to him while in plaintiff's employ. The restrictive covenant in the contract of employment was held to be void, and the case was determined upon the rights of the parties independent of that covenant. On a hearing in private before the chancellor, plaintiff limited its evidence to showing the confidential relationship existing between it and Iliff, and

to proof of the process described in exhibit 6, entitled, "The lime process for neutralizing free phosphoric acid," and the secret nature of the process. The court (545-546), quoting from 22 Cyc. 842, said:

"A trade secret is a plan or process, tool, mechanism or compound known only to its owner and those of his employees to whom it is necessary to confide it. * * * A process commonly known in the trade is not a trade secret and will not be protected by injunction, but the mere fact that there are secret processes of a different kind accomplishing the same result will not prevent the granting of an injunction."

And further, after stating that the courts will restrain an employee from making disclosure of or using trade secrets communicated to him in the course of a confidential employment where all the facts warrant such relief, said:

"The burden of proof in such case is upon the complaining party. To be entitled to relief in this case complainant was required to prove that it was using the process of manufacture disclosed in exhibit 6 and that it was a trade secret; * * * that the secret was communicated to Iliff while he was employed and under contract and in a position of trust and confidence, under such circumstances as to make it inequitable and unjust for him to disclose the secret to others and make use of it to complainant's prejudice."

Upon review of the evidence the court held that the process described in exhibit 6 was not a secret process; that Iliff was the discoverer of it. Dismissal of the complaint for



want of equity was affirmed.

The hearing on the motion to dissolve being on complaint and answer, it was necessary that plaintiff show by proper averment that the formulas, recipes, processes and data, etc., sought to be protected were trade secrets. The allegation that all of plaintiff's formulas, etc., are trade secrets, is merely a conclusion as to the ultimate fact to be determined by the court. It is unsupported by allegation of any fact except the allegation as to the efforts of plaintiff to protect and guard them. This is insufficient to establish a secret process or trade secret. Victor Chemical Works v. Iliff, supra. (p. 547). The allegation that plaintiff is marketing over 70 food products, many of which were originated by it, and that it has heretofore been the sole manufacturer of some of them - there being no comparable products sold by competitors, is inconsistent with and contradictory of the conclusion that all the formulas, etc., are trade secrets. If we assume that the formulas, etc., as to the products of which plaintiff is the sole producer, are trade secrets because competitors lack the know-how to produce them, the record is silent as to the number and the particular food products within this group. As to the remaining food products of which plaintiff is the originator, we must assume that these are now being produced by competitors who have acquired the know-how, and that the formulas, etc., are no longer trade secrets. As to the unspecified number of food products manufactured by plaintiff but not originated by it, we must assume, in the absence of allegation of fact, that the formulas, etc., are

not trade secrets and have not been since plaintiff began the manufacture of them. Plaintiff's right to an injunction, if any, was limited to the formulas, etc., shown to be trade secrets. (Victor Chemical Works v. Iliff, supra), and these formulas, or the particular food products manufactured from them, should have been specified in the complaint and in the injunction. Defendants' motion to dissolve should have been allowed. ✓

The order is reversed and the injunction as modified is dissolved.

ORDER REVERSED.

Feinberg, P. J., and Tuohy, J., concur.

44535

FRED STEIN, EDWARD E. GLATT
and NATHAN B. LANS,

Appellants,

v.

EAST OAK STREET HOTEL COMPANY,
a Delaware Corporation, et al.,

Appellees.

APPEAL FROM

CIRCUIT COURT

COOK COUNTY.

335 I.A. 570¹

MR. JUSTICE TUOHY DELIVERED THE OPINION OF THE COURT.

Plaintiffs appeal from a decree dismissing their complaint for want of equity. Plaintiffs Edward E. Glatt and Nathan B. Lans are shareholders of defendant East Oak Street Hotel Company, and plaintiff Stein is Glatt's agent. The individual defendants, Delbert M. Ruggles, Clarence Pullum and Edwin J. Elting, constitute the entire board of directors of the hotel company. Ruggles and Elting are, respectively, president and secretary of the corporation. On August 1, 1946 the directors of defendant company addressed a communication to the shareholders stating that in view of increasing costs and stabilized rentals they were seriously considering the advisability of selling all the assets of the corporation and that a special meeting of the shareholders would be called to consider the matter if it appeared that a favorable offer could be obtained. On September 5, 1946, by resolution of the board of directors, a procedure was established for conducting the proposed sale. A bank was appointed as agent to receive offers. Bids were required to be made on special forms supplied by the corporation and accompanied by a deposit of \$50,000. Successive bids could be made, but only when \$15,000 greater than the last highest bid, and the bidding was to remain open until 12:00 noon October 10, 1946. Among the many terms of the bid form was the following:

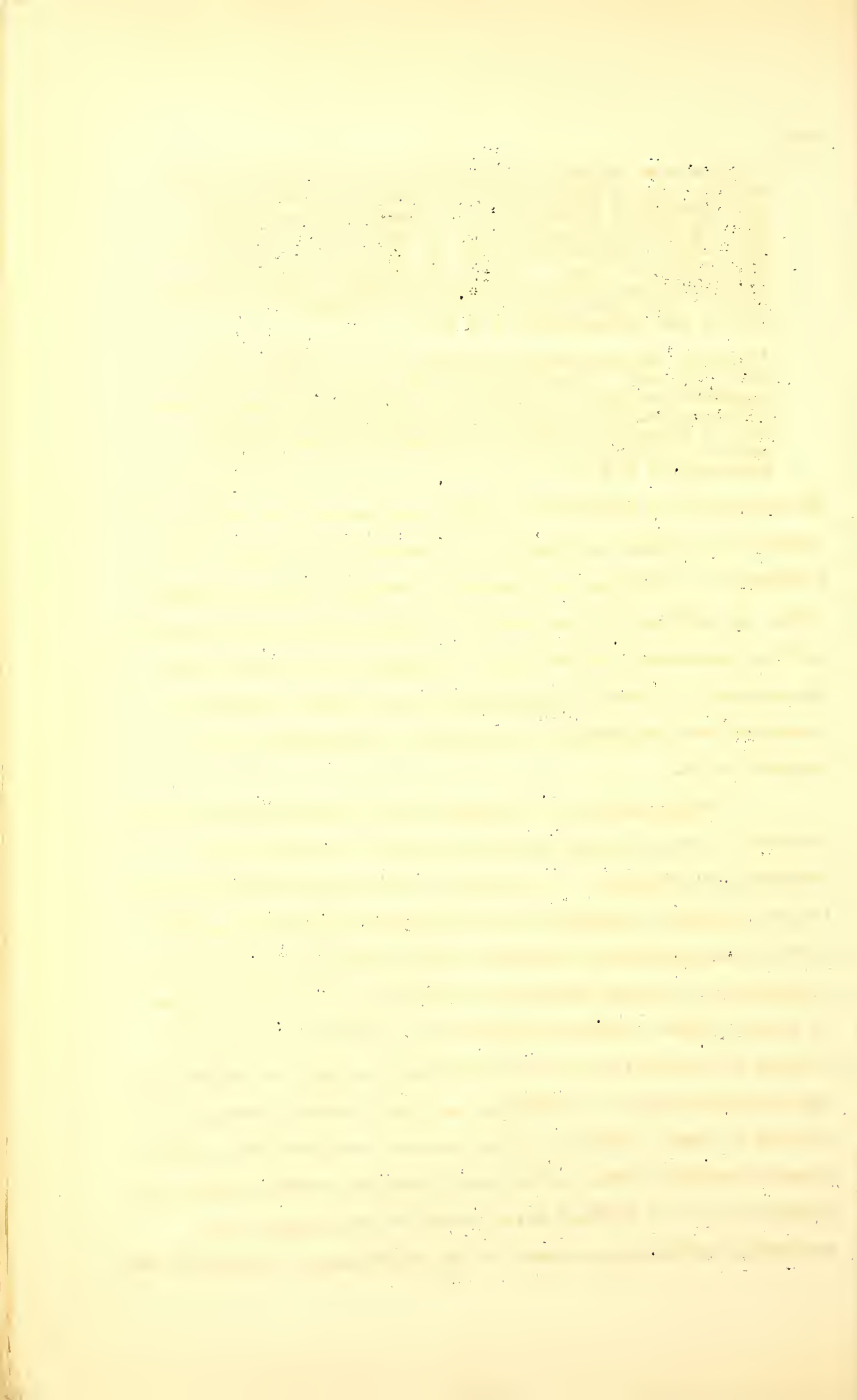
The first part of the report deals with the general situation of the country. It is a very interesting and informative study of the country's development. The second part of the report deals with the specific details of the country's development. It is a very detailed and thorough study of the country's development. The third part of the report deals with the specific details of the country's development. It is a very detailed and thorough study of the country's development. The fourth part of the report deals with the specific details of the country's development. It is a very detailed and thorough study of the country's development. The fifth part of the report deals with the specific details of the country's development. It is a very detailed and thorough study of the country's development. The sixth part of the report deals with the specific details of the country's development. It is a very detailed and thorough study of the country's development. The seventh part of the report deals with the specific details of the country's development. It is a very detailed and thorough study of the country's development. The eighth part of the report deals with the specific details of the country's development. It is a very detailed and thorough study of the country's development. The ninth part of the report deals with the specific details of the country's development. It is a very detailed and thorough study of the country's development. The tenth part of the report deals with the specific details of the country's development. It is a very detailed and thorough study of the country's development.

" (9) * * * Neither the receipt by you of this offer or the earnest money deposited hereunder, nor any of the provisions hereinabove or hereinafter contained, nor any action taken by you, or by La Salle National Bank shall constitute, imply or create any obligation whatsoever by you, * * * at any time or under any circumstances unless and until specific written acceptance of the terms of this offer is communicated by you to the undersigned * * *.

"(10) It is expressly understood by the undersigned that any sale or contract for the sale of the above described property requires the approval of your shareholders, and it is further understood that you will call a special meeting of your shareholders for the purpose of considering the sale of the above described property. * * * "

On the same day, September 5, 1946, the corporation mailed the notice of a special meeting of the shareholders called for September 30, 1946 for the purpose of voting on the proposed sale. An outline for the plan for obtaining competitive bids and the directors' solicitation of proxies were included in the notice. It further appears that the proxies expressly permitted the proxyholders to approve or disapprove any proposed sale.

Subsequently, on September 16th, Stein, Glatt's agent, executed a formal offer, in his own name, to purchase the property for \$975,000. At the time of the shareholders' meeting on September 30th this was the highest bid received. The meeting was adjourned to October 18th, however, in view of the possibility of higher bids being received prior to 12:00 noon on October 10th. Elting, the secretary, notified all shareholders of the action taken at the first meeting and expressed the directors' hope of obtaining an offer yielding between \$25 and \$30 a share. After receiving notice of higher bids, Stein executed another formal offer for \$1,140,000 shortly before the bidding closed on October 10th, which was the highest bid received. Elting again wrote to the shareholders telling of the



bid for \$1,140,000 calculating that, if accepted, it would yield approximately \$27 per share, and announcing that this offer would be submitted for approval at the adjourned special meeting on October 18th. At a directors' meeting the individual defendants voted to sell the property for not less than \$1,140,000, after the deduction of broker's commission but before the deduction of all expenses, subject to approval of the stockholders. At the shareholders' meeting it developed that a new and higher bid was in the offing and the meeting was recessed temporarily. During the recess, Ira Shapiro deposited a check for \$50,000 and executed a bid for \$1,155,000, the offer to remain open until October 31, 1946. Upon reconvening the meeting a resolution was adopted accepting the bid of \$1,155,000. By a second resolution the Stein bid of \$1,140,000 was rejected. Following the close of the shareholders' meeting the directors met again and passed a resolution authorizing the president of the corporation to negotiate and contract for the sale of the real estate at a price of not less than \$1,155,000. Later the same day, Ruggles, as president of the hotel company, gave Stein written notice of the rejection of his bid and returned his deposit of \$50,000 conditioned upon his waiver of all claims against the corporation. On October 19th Stein refused to accept the return of his deposit and instituted the present action against the corporation and its directors. Subsequently the directors rejected Stein's bid and returned his deposit of \$50,000. Shapiro refused to accept the return of his deposit, and the directors sought to induce him to take the property subject to the Stein litigation for the same price of \$1,155,000. Shapiro refused to accede to these conditions and

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negotiations were broken off on December 17th. He accepted the return of his deposit some time after February 1, 1947. The defendant corporation paid \$14,625 for legal fees and expenses in connection with the proposed sale of the property in December of 1947.

On February 15, 1947 the defendant directors called the annual shareholders' meeting for March 4th and solicited proxies for their reelection as directors and for ratification of the original resolution to sell all the corporate assets for \$1,155,000. Glatt and Lans made a demand on the defendants as stockholders of record for access to the names and addresses of all shareholders in order to solicit opposition proxies and present their side of the pending litigation. The request was refused, although it appears that a stockholders' list in compliance with the statute was in the office of the hotel company for ten days before the March 4th meeting and was kept there until after the election. At the meeting of March 4th plaintiffs asserted that the individual defendants were ineligible for any office under the Delaware law because of the refusal of the directors to make the list of shareholders available to them for examination at any time during the ten day period prior to election. Plaintiffs were ruled out of order, and over their protests, the individual defendants, through the use of proxies, re-elected themselves directors and adopted a resolution giving the directors the power to sell the corporate assets for \$1,155,000. During the trial Glatt raised his bid to \$1,155,000 and announced that if the court would not grant specific performance on the basis of the increased bid he would guarantee a bid of \$1,155,000 if the court would direct a competitive sale to be held not later than

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December 30, 1947 and sought the entry of a decree directing that the property be sold to Glatt for \$1,155,000, or, **in the alternative**, that the property be sold in open court prior to December 30, 1947.

The plaintiffs' original theory of this case was that a freehold was involved and that Stein and Glatt were entitled to specific performance of the agreement to sell the property and that the chancellor erred in denying such relief. These questions have been disposed of adversely to plaintiffs' contention by the Supreme Court in Stein et al. v. East Oak Street Hotel Company et al., 400 Ill. 267. Certain other questions raised in the appeal have been transferred to this court for consideration.

Plaintiffs have interspersed their complaint against the individual defendants with charges of wrongdoing and fraud. In examining the various contentions we are aware of the many pronouncements of our courts to the effect that fraud is a charge easy to make, particularly under the protection of a court proceeding, but that it is not to be presumed and must be clearly proved. The First National Bank of Chicago v. The Bryn Mawr Beach Building Corporation et al., 365 Ill. 409; Sulinski v. Humboldt and Wabansia Building Corporation, 315 Ill. App. 392.

Plaintiffs contend that at the shareholders' meeting on October 18, 1946 the individual defendants wrongfully voted their proxies in rejection of Stein's bid of \$1,140,000. The evidence in the case establishes that no contract for the sale of defendant corporation's property ever existed between the corporation and the plaintiffs. There was an offer made by plaintiffs which by its terms was expressly subject to the approval of the shareholders

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of the defendant corporation. The offer required the defendants to call a meeting of shareholders to consider ~~plaintiff's~~ bid and any other bids. The undisputed proof shows that such a meeting was called and that the shareholders, through their proxyholders, voted to reject ~~plaintiff's~~ bid. There is no basis in law or in fact for the contention of plaintiffs that the directors owed a contractual duty to the plaintiffs to vote in favor of accepting Stein's bid. The duty of the directors as proxyholders was only to the corporation and the shareholders and not to any bidder.

Plaintiffs claim that the directors breached both their fiduciary as well as contractual duties in voting against the sale to Stein. Plaintiffs do not make it clear to whom the directors owed contractual and fiduciary duties. As has been pointed out, they owed no contractual duty to plaintiffs, nor did they occupy such relationship to Stein as would in any way involve fiduciary obligations. On October 10th it appeared that an offer in excess of \$1,140,000 theretofore made by Stein was about to be made by another bidder. Under the circumstances it would seem fair and reasonable that the directors inform the shareholders of this prospective bid. Upon being informed that a \$15,000 higher bid was made or about to be made, the shareholders rejected the lower bid. We fail to see that the directors acted in violation of any fiduciary obligation, ^{such} if any/existed, or in any manner subjecting them to reasonable criticism in this connection. The shareholders at the meeting could have rejected Stein's bid even though no higher bid had been received.

Plaintiffs further contend that even if the court

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should determine that defendants had a right to reject Stein's bid, then it was the individual defendants' duty ^{that} to consummate the sale with Shapiro for \$1,155,000, and/ by failing to do so they violated their trust. The record shows that by its terms Shapiro's bid could be accepted up to October 31st. Shapiro's bid occupied the same legal status as did Stein's. It was merely an offer which the shareholders could accept or reject as they saw fit. On October 29th the company wrote him that it had not decided whether to accept his bid or not and asked whether he would extend the time for acceptance. He declined to extend the time. It is apparent from the testimony that the reason why Shapiro's bid was not accepted was because of the pendency of Stein's suit. Even though the suit was without merit, as the individual defendants had been advised by their counsel, it nevertheless constituted a cloud upon the title and they were unable to conclude the deal with Shapiro. There can be no doubt that the Stein suit prevented the culmination of the Shapiro deal for the proof shows that the directors sought to **induce** Shapiro to conclude the sale for \$1,155,000, taking the property subject to the Stein suit, but that Shapiro refused. The **disingenuous** contention that the directors violated their trust in returning Shapiro's deposit is without equity, coming as it does from the parties who, by filing a law suit the validity of which their own argument denies, forestalled the sale.

Plaintiffs contend that the directors should be held personally liable to the corporation for "wasting over \$14,000 for the sales which they never intended to make." No contention is made by plaintiffs that the amounts of the expenditures are excessive, nor can any just complaint be

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made on these grounds. The sum of \$5,700 was paid to the bank which acted as agent to receive bids, and the amount paid equals one-half of one per cent of the sale price. This was a matter within the sound discretion of the directors. Some \$1,300 was spent in advertising the property for sale. Advertisements were in the leading Chicago newspapers and, in the absence of proof to the contrary, it must be assumed that the amounts were the usual and customary advertising rates. The other item had to do with attorneys' fees paid in connection with preparations and arrangements for the attempted sale. These included the preparation of all necessary minutes, bid forms and all necessary papers, and included negotiations of company's counsel with Mr. Shapiro in an attempt to complete a sale to him. We can not say that the charges made for these multifarious services were unreasonable. Plaintiffs' statement that the officers and directors never intended to make a sale finds no support in the evidence.

Finally, plaintiffs contend that by refusing to submit a list of stockholders prior to the election of March 4, 1917 the individual defendants under the Delaware law forfeited their right to eligibility as officers and directors of the company. The question of whether or not there was an actual refusal is in dispute; also the question as to whether or not the request was made by the plaintiffs in good faith; also the question of whether or not the ineligibility provisions of the act are effective for a failure to display the stockholders' list for a period of ten days or for a failure only to produce the same for examination on the day of election.

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In view of the fact that the term for which the disputed election was held expired in March of 1948, the question is moot, and we do not deem it necessary to this opinion to consider further the questions raised.

We are of the opinion that the evidence in the case amply justified the action of the chancellor in dismissing the bill for want of equity, and the decree is affirmed.

AFFIRMED.

Feinberg, P. J., and Niemeyer, J., concur.

43976

PEOPLE OF THE STATE OF ILLINOIS,
ex rel. DAVID KING, JOSEPH BOLAND,
JOHN WALSH, SYLVESTER LESSER and
TIMOTHY SHORT,

Appellees,

v.

WALTER L. GREGORY, WILLIAM F.
CLARKE and JAMES B. CASHIN, Civil
Service Commissioners of the City
of Chicago, and OSCAR HEWITT,
Commissioner of Public Works of the
City of Chicago,

Appellants,

and

THOMAS TIERNEY, GEORGE PRENA, JOHN
MALONEY, CHRISTIAN BUCKBERG, ALFRED
HINRICKS, FRANCIS TUIITE, WILLIAM
LELEVELT, PATRICK O'DONNELL and
RAYMOND BUTLER,

Intervenors - Appellants.

APPEAL FROM

SUPERIOR COURT

COOK COUNTY.

335 I.A. 570²

MR. PRESIDING JUSTICE BURKE DELIVERED THE OPINION OF THE COURT.

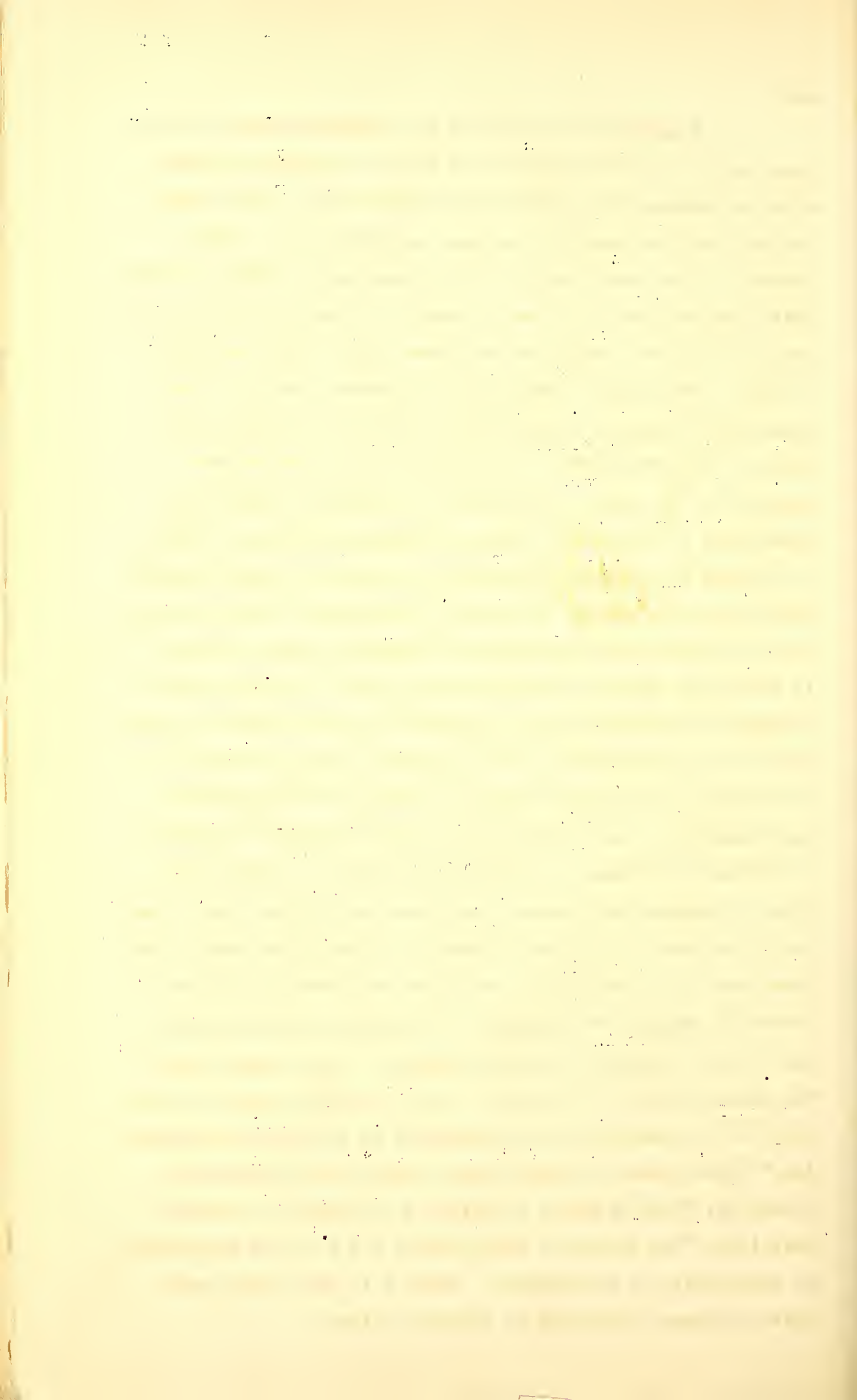
Relators filed a complaint in the Superior Court of Cook County against the Civil Service Commissioners and the Commissioner of Public Works of the City of Chicago for a writ of mandamus to compel the defendants to reinstate and employ them as hoisting engineers in the classified service of the city. Their basic contention is that combination truck and air compressor units were being operated by chauffeurs and that the operation of such units is properly a position to be filled by hoisting engineers.

The defendants answered and asserted that a new position for the operation of these units was created by the 1946 appropriation ordinance providing for "Operators of Combination Truck and Air Compressor Units," that the Commission had classified that position and would hold a pro-

motional examination therefor, and that hoisting engineers and motor truck drivers would be eligible. Leave to intervene was granted to nine temporary appointees employed by the city as operators of combination truck and air compressor units, some of whom were civil service chauffeurs and motor truck drivers and others, persons who held no civil service rating whatever. These intervenors joined with the defendants in opposing relators' complaint. A trial upon the merits resulted in a finding and judgment for the relators and that the writ of mandamus issue. In a written opinion the trial court found that the new position created in the 1946 appropriation ordinance was but a device for the employment of chauffeurs in the position of hoisting engineers. The intervenors joined with the defendants in prosecuting an appeal.

Relators are permanent civil service hoisting engineers, who, by reason of their seniority, are entitled to be restored to their rightful employment in the classified service. They were laid off from work in the Water Pipe Extension Division of the Department of Public Works on various dates. During the course of their employment they operated combination truck and air compressor units, including driving the units to and from their place of use. The nine intervenors are operating combination truck and air compressor units. At least five of them are operating such units in the Water Pipe Extension Division. Three of these five intervenors are civil service chauffeurs, or motor truck drivers. The other two are temporary appointees without any civil service rating. All of the intervenors are now employed as temporary appointees. Plaintiffs were laid off while the intervenors were retained in operating combination truck and air compressor units.

A combination truck and air compressor unit of the type used by the city consists of a large compressor machine which is permanently mounted on a truck chassis. The machine extends from the driver's cab over practically the entire surface of the truck body. The air compressor machine of these units produces power to break concrete in the public streets in order to make an opening to the sewer pipes. The operators of these combination truck and air compressor units of the Water Pipe Extension Division drive them to and from their place of use and operate and maintain the air compressor machines on the job. The position of hoisting engineer is classified in the civil service in Branch II, Class F, Grade 3. Branch II embraces positions, the duties of which involve operation, maintenance and upkeep of municipal activities and the construction and betterment of municipal works. Class F in Branch II embraces positions, the duties of which require training and ability in the operation and maintenance of equipment for the production of heat, light or power. Grade 3 is the senior grade, which embraces positions of intermediate responsibility. As established by the Commission's schedule of Offices and Places of Employment, Grade 3 of Branch II, Class F embraces engineering positions and included among such positions there is listed "Operator of Air Compressors." The Secretary of the Commission testified that "Grade 3, Class F, Branch II includes the schedule for hoisting engineers and under that schedule is included Operator of Air Compressors." The Superintendent of the Water Pipe Extension Division testified that "operating an air compressor is a hoisting engineer's job." Chauffeurs and motor truck drivers are classified in Branch II, Class G, Grade 2. Class G in Branch II embraces positions, "the duties of which relate * * * to the conveyance of merchandise or passengers." Grade 2 is the junior grade which embraces "positions of routine duties."



As far back as 1940 the City Council attempted to give the work of operating these combination truck and air compressor units to chauffeurs. In that year and the year following the council, in addition to appropriating for hoisting engineers at \$13.60 per day, made an appropriation for "chauffeurs (when acting as hoisting engineers on air compressors) at \$13.60 per day." These appropriations were for the Water Pipe Extension Division. As a consequence, five hoisting engineers were laid off from work in the Water Pipe Extension Division and their positions were filled by three civil service chauffeurs and two temporary appointees. The record does not disclose what pertinent appropriations were made in 1942 and 1943, but shows that in 1944 an appropriation was again made for the Water Pipe Extension Division as follows: "Chauffeurs (when acting as hoisting engineers on air compressors) at \$13.60 per day"; and in 1945 for "chauffeurs operating air compressors mounted on trucks at \$13.60 per day." Such daily rates of pay were the same as allowed for hoisting engineers in these appropriation ordinances. In the 1946 appropriation ordinance an appropriation was made for "Operators of combination truck and air compressor units at \$14.80 per day," the same pay as provided therein for hoisting engineers. The Commission classified this position of operator of combination truck and air compressor units in Branch II, Class F, Grade 3 (the identical classification of hoisting engineers) and on April 29, 1946 the commission issued its call for an examination therefor, specifying that it was a promotional examination and made eligible for the examination hoisting engineers, motor truck drivers and chauffeurs. The holding of this examination was temporarily enjoined by an order in another case. The superintendent of the Water Pipe

engineers are eligible, was a proper exercise of the Civil Service Commission's power. Relators state that while the City Council may in the interest of economy combine two existing positions in one, it cannot legally create a new position by giving a new title to duties within the scope of an existing position and thereby deprive eligible civil service employees of their rights thereto. In People ex rel. Fleming, et al., v. Geary, et al., 322 Ill. App. 338, we decided that hoisting engineers were entitled to the positions of operators of combination truck and air compressor units. Appellants attempt to escape the binding effect of that opinion by asserting that the rule was based on the schedule of duties in the civil service commission's classification and on the title of the position as described in the 1944 appropriation ordinance, "Chauffeurs (when acting as hoisting engineers on air compressors)." They state that the effect of the opinion was to confront the city with a potential expense of over \$40,000 annually to maintain both a chauffeur and a hoisting engineer on each combination unit; that the City Council in the 1946 appropriation ordinance created the new position of operators of combination truck and air compressor units; and that the Civil Service Commission classified that position as a promotional position for hoisting engineers and chauffeurs.

It is undisputed that when the Fleming opinion was filed, hoisting engineers were entitled to the positions occupied by chauffeurs and others operating these combination truck and air compressor units. Since then there has not been any change in the actual duties of an operator of such combination unit. The only change has been in the title of the position and the classification thereof by the Civil Service

Commission. We cannot agree with appellants that the effect of the Fleming opinion was to confront the city with the expense of maintaining both a chauffeur and a hoisting engineer on each combination truck and air compressor unit. In that opinion the court said (341):

"It was the practice and custom for the hoisting engineers assigned to operate the air compressors on the combination trucks and air compressors to drive same to and from the place of use of the air compressor."

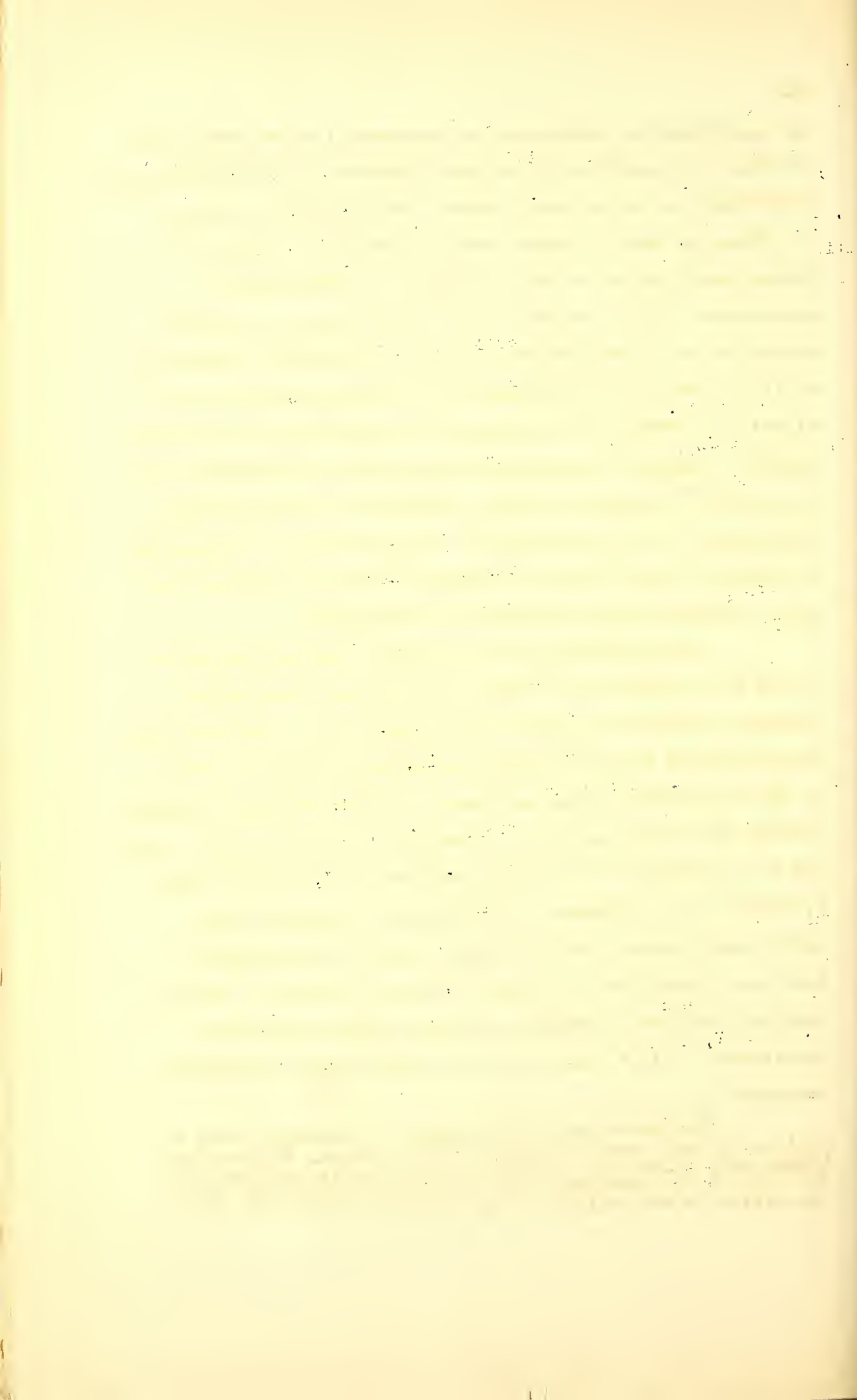
Hoisting engineers never contended that chauffeurs or motor truck drivers should be employed to drive the units to and from their place of use.

The facts established in the instant case are essentially the same facts which were admitted by the defendants in the Fleming case. Relators, by successfully passing a competitive examination, probationary employment and satisfactory performance in their duties, are permanent civil service hoisting engineers, first on the Civil Service Commission's list of hoisting engineers eligible for reinstatement. Two were laid off for lack of work in the Water Pipe Extension Division in 1941 and the others in 1944. They made a written demand upon the Commission and the Commissioner of Public Works for reinstatement. During the course of their employment they operated combination truck and air compressor units and drove the units to and from their place of use. This is the practice and custom of all hoisting engineers operating these combination units. The nine intervenors comprising civil service chauffeurs, motor truck drivers and temporary appointees without any civil service rating are now and have been operating combination truck and air compressor units in the city's employ. The position of hoisting engineer is classified in the civil service of the city in Branch II, Class F, Grade 3, which embraces positions of intermediate responsibility, the duties of which require training and ability in

the operation and maintenance of equipment for the production of power and specifically includes "Operator of Air Compressors." //
Chauffeurs and motor truck drivers are classified in Branch II, Class G, Grade 2, which embraces positions of routine duties which relate to the conveyance of merchandise or passengers. Up to the time of the trial there had been no change in the classification of duties of hoisting engineers, or in the duties of chauffeurs or motor truck drivers in the classified service. The statement of the duties of a hoisting engineer operating a combination truck and air compressor unit is the same statement of duties adopted by the Civil Service Commission for the new position. We agree with the conclusion of the trial court that the creation of the new position was only a device for the employment of chauffeurs.

The classification by the Civil Service Commission of the new position and calling a promotional examination therefor, violates the rules of the Commission. The Commission has classified the new position in Branch II, Class F, Grade 3, the same branch, class and grade in which hoisting engineers are now and always have been classified. The new position could not be a promotion for hoisting engineers. Branch II, Class F, Grade 3 is a different and higher class and grade than motor truck drivers and chauffeurs, who are now and always have been classified in Branch II, Class G, Grade 2. The new position would be a promotion for motor truck drivers and chauffeurs. Rule V, Sec. 2 of the Civil Service Commission provides:

"No person shall be eligible for promotion from a position in any rank or grade to fill a vacancy in the next higher rank unless the position in which he is employed at the time of the examination is in the same branch and class of service as the position to be filled * * *."



Under this rule chauffeurs and motor truck drivers, being in Class G, could not be promoted to the new position because that position has been classified in Class F. The Civil Service Commission is bound by its own rules. Ptacek v. People ex rel., Deneen, 194 Ill. 125; Collins v. County of Cook, 208 Ill. App. 262.

Defendants assert that the right of mandamus will not issue where it will work injustice to the municipality, will create confusion in the public service and will place an unnecessary financial burden on the taxpayers. In our opinion the record in this case does not warrant the statement that the issuance of the writ of mandamus will create confusion in the public service or increase the city's cost of operation of combination truck and air compressor units. The record shows that the duties being performed by the intervenors and public appointees in the operation of truck and air compressor units are in fact and in law the duties of civil service hoisting engineers. The Commission is legally bound to certify civil service hoisting engineers eligible for reinstatement in the order of their seniority.

For the reasons stated, the judgment of the Superior Court of Cook County is affirmed.

JUDGMENT AFFIRMED.

KILEY AND LEWE, JJ. CONCUR.

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J. V. NANNY, doing business as
Merchants Wholesale,

Appellant,

v.

THE H. E. POGUE DISTILLERY
COMPANY, a corporation,

Appellee.

APPEAL FROM

CIRCUIT COURT,

COOK COUNTY.

335 I.A. 571

MR. JUSTICE KILEY DELIVERED THE OPINION OF THE COURT.

This is an action for damages in the sum of
\$97,360, based on a breach of contract for the sale of whiskey.
The court without a jury found that the contract was breached
and assessed plaintiff's damages at one cent. Plaintiff has
appealed.

Plaintiff was a wholesale whiskey dealer in
Los Angeles, California. In 1940 he and defendant made a
contract under which plaintiff was to be defendant's exclusive
distributor in that area. March 3, 1941 they made a contract
for the sale to plaintiff of 200 barrels, "currently distilled",
Kentucky Bourbon whiskey. Plaintiff claims that, pursuant
to this contract, he gave a further "order" to defendant for
an additional 200 barrels in October 1941. The court found,
and there can be no question about it on the record, that
the March contract was made and breached by defendant. The
court found that the plaintiff did not prove by a preponder-
ance of evidence that a "contract" was made for an additional
200 barrels in October 1941. Defendant denied in its pleading
and at the trial that there was such a "contract". Plain-
tiff contends here that the court misconceived his theory
and that he did not claim a second contract and that his
reliance was upon the "order" given in October pursuant to
the contract of March 3rd.

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We think it is unnecessary to decide whether the alleged transaction in October was a contract or order. Plaintiff's theory at the trial, and as it must therefore be here, was that the transaction in October was effected through defendant's officer, Haugh at Chicago office. There was no reliance on the agency of defendant's representative Jones at the trial, and no contention that the relationship of the Chicago office and Haugh to the transaction was irrelevant.

The issue on the October transaction was highly controverted. Each party tendered witnesses on the issue and the court questioned several of these. Jones, who executed the instrument relied on, testified that he dictated the instrument over long distance telephone from Los Angeles to the Chicago office; that he talked with Haugh and Oakes and that one of the stenographers in the office was on the telephone; and that the instrument was written in Chicago and transmitted to him for execution, to California. Haugh, Oakes and the two stenographers then employed in Chicago by defendant, either denied or did not remember the call. Jones said he had the instrument written in Chicago because he had no Pogue letterheads with him in Los Angeles. This was denied by Haugh and Oakes. The March contract was drawn in Chicago and was signed for defendant by Haugh, Secretary-Treasurer. The disputed October instrument is signed for defendant by Jones.

Haugh, Oakes and the two stenographers denied the October instrument was drawn in Chicago. These four witnesses made a sample of typewriting for comparison by the court with the disputed instrument. There was evidence justifying the inference that on or about October 15th, the date

of the instrument, credit relations between plaintiff and defendant were not stable and that soon thereafter a new distributor in lieu of plaintiff was engaged for the Los Angeles area by Jones. A shipment of whiskey was consigned by defendant to this new distributor. The whiskey was seized by plaintiff in an attachment suit begun against defendant in Los Angeles on November 29, 1941. That action was based upon breaches of the distributor contract of 1940, and the sale contract of March 3, 1941. Negotiations were had in December 1941 to settle the attachment suit. There is evidence that at these negotiations a breach of the March contract was discussed, but there is no evidence of any discussion of the disputed order of October. In view of the highly conflicting nature of the testimony on the issue we see no reason under all these circumstances to disturb the court's finding that the October transaction was not proved by a preponderance of evidence.

Plaintiff makes contentions here with respect to the Los Angeles attachment proceeding which have no bearing on the issues involved. The trial court considered allegations made by plaintiff in his complaint in that proceeding only in so far as they bore on the questions of the date of the breach by defendant, of the March contract and the availability on the market of current distillation Kentucky Bourbon. In the complaint filed November 29, 1941 in Los Angeles, California, plaintiff charged defendant with a breach of the March contract and claimed damages of \$2,000 upon the 200 barrels based on the increased market value of the whiskey. This allegation, together with oral testimony as to what transpired during negotiations for settlement of the Los Angeles suit, justifies the trial court's inference that the defendant

The first part of the paper is devoted to a general discussion of the problem of the origin of life. It is shown that the problem is one of the most important and most difficult in the history of science. The second part of the paper is devoted to a discussion of the various theories of the origin of life. It is shown that the most plausible theory is that of spontaneous generation. The third part of the paper is devoted to a discussion of the evidence in favor of spontaneous generation. It is shown that the evidence is very strong and that it is not possible to explain the origin of life in any other way. The fourth part of the paper is devoted to a discussion of the implications of the theory of spontaneous generation. It is shown that the theory has important implications for our understanding of the history of life on earth. The fifth part of the paper is devoted to a discussion of the future of the study of the origin of life. It is shown that the study is still in its infancy and that there is much work to be done.

breached its contract in the Fall of 1941 and that plaintiff recognized that breach when he filed his suit in the subsequent negotiations. There was testimony that during the negotiations, Jones, on behalf of defendant, offered to perform on the March contract but the tender was rejected by ~~plaintiff~~ who said he had lost the opportunity to make a profit which he could have made earlier. This testimony consisted of depositions of Los Angeles attorneys. Jones denied the tender and rejection, but the court had before it excerpts from a report by Jones to defendant of the Los Angeles conference which controverted the denial. We see no reason to disturb the court's conclusion on these questions.

The claim for damages in the Los Angeles suit was \$10 a barrel, based on the existence of a market for the whiskey. In the instant suit the basis of plaintiff's claim is a resale contract with his brother for 200 barrels of whiskey each year during 1941, 1942, 1943 and 1944, to be paid for at the market prevailing when the merchandise had been aged 4 years. This resale contract was first mentioned in the second amended complaint filed in October 1945. It was alleged that this contract was known to defendant when the March contract between plaintiff and defendant was made. The trial court decided that it was necessary to show, as a basis for the special damages sought, that plaintiff was unable to supply the whiskey from the market. It found the proof was not made.

It will not be necessary for us to decide the question whether defendant knew of the resale contract. The trial court found that plaintiff offered evidence that he was unable to buy comparable whiskey in the Fall of 1942, but offered no testimony of his inability to buy the same for the latter part of 1941 or early in 1942. There was testimony for defendant that comparable



whiskey was available on the market in the latter part of 1941 and early in 1942. Allegations in plaintiff's Los Angeles complaint corroborates this testimony. There would be no justification, therefore, in disturbing the court's finding as to this deficiency in the plaintiff's case. Since the plaintiff did not show that he attempted to purchase the comparable whiskey on the late 1941 and early 1942 market, in mitigation of the damages, there was no basis for assessing the special damages sought by plaintiff. Match Corporation v. Acme, 285 Ill. App. 197; Armeny v. Madson, et al., 111 Ill. App. 621; Black Diamond Fuel Co., v. Illinois F. & P. Co., 219 Ill. App. 150; Supergear Drive Corp. v. Hollister-Whitney Co., 327 Ill. App. 414; 46 Amer. Juris. p. 817. It follows that the nominal assessment was proper.

For the reasons given the judgment is affirmed.

AFFIRMED.

BURKE, P.J. AND LEWE, J. CONCUR.

LOUIS H. PINK, etc.,

Original Plaintiff,

ROBERT E. DINEEN, Superintendent of
Insurance of the State of New York,
as Liquidator of National Surety
Company,

Successor Plaintiff, Appellee,

v.

PETER S. SARELAS,

Defendant - Appellant.

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

335 I.A. 572¹

MR. JUSTICE KILEY DELIVERED THE OPINION OF THE COURT.

This is an action upon a contract of indemnity to recover a loss of the National Surety Company as surety for defendant on an appeal bond. The court without a jury entered a judgment for plaintiff in the sum of \$2,347.34. Defendant moved to vacate the judgment and to enter judgment for defendant and, in the alternative, for a new trial. This motion and a subsequent motion in arrest of judgment were denied. Defendant has appealed from the judgment and from the orders denying the subsequent motions.

D. L. Tarjan recovered judgment against Sarelas in the Municipal Court of Chicago on April 12, 1930 for \$1250 and costs. Sarelas appealed to this court and applied to the Surety Company for a bond of \$2500 to secure Tarjan. An appeal bond was executed and subsequently this court on April 16, 1931, affirmed the judgment. (Tarjan v. Sarelas, 261 Ill. App. 647.) September 28, 1931, Tarjan, for use of his assignees, sued the Surety Company on the bond. Sarelas refused to defend and advised the Surety Company he had paid the judgment in a garnishment proceeding brought by the assignees of a judgment creditor of Tarjan. The suit on the bond resulted in judgment against the Surety Company for \$1,365 and costs. This court affirmed that judgment.



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(Tarjan v. Surety Co., 268 Ill. App. 232). The Surety Company paid that judgment in three installments. The last installment was paid March 2, 1933.

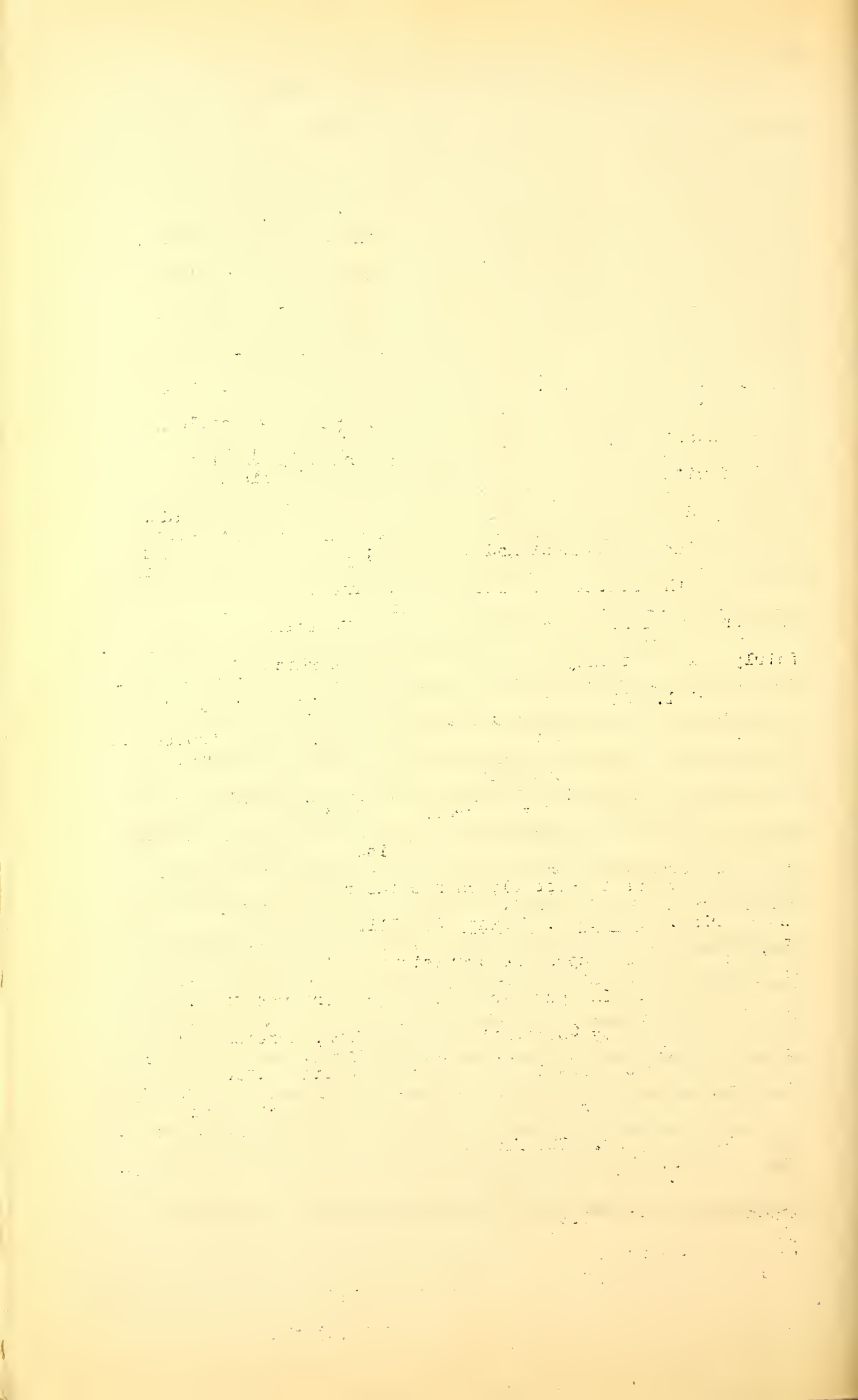
Judgment in the instant suit was entered July 18, 1947. On July 28, Sarelas moved to set aside and vacate the judgment and to enter judgment for him or, in the alternative, to grant him a new trial. Twenty eight grounds were specified in the motion. All but two were based upon evidence and rulings at the trial. The record before us contains no report of the trial. It contains a report of the proceedings under the motion. Two grounds involve the claim of newly discovered evidence in the form of two documents. The motion and supporting affidavit state the documents were not available to Sarelas at the time of trial and, although he and his attorney exercised diligence, were not discovered until after the trial was concluded and are so conclusive that they should lead to a different result on a retrial.

April 29, 1933 the Surety Company was ordered by the Supreme Court of New York into the possession of the State Department of Insurance for rehabilitation. The Superintendent of Insurance was named rehabilitator. The same day an agreement was made between the Surety Company by the rehabilitator and the National Surety Corporation by virtue of the court order. June 1, 1934, the New York Court ordered the Superintendent of Insurance to take possession, and liquidate the affairs, of the Surety Company. He and his successors were "hereby" vested with title to all the Company's property and rights of action. The agreement of April 29, 1933 was adopted in the liquidation proceeding and the liquidator authorized to make modifications in the "servicing features" of the agreement.

The order dissolved the National Surety Company.

Defendant argues here that the documentary evidence presented by his motion showed that plaintiff had no title to the claim sued upon; that when the Surety Company went into rehabilitation and liquidation it had no claim against defendant on its books; that there was no proper accounting to defendant of the sale by the Surety Company of collateral pledged with it by defendant; that defendant's liability terminated when he furnished the Surety Company with evidence that the Tarjan judgment had been paid; and that the suit is barred by the statute of limitations.. The third and fourth arguments will not be considered here. We think it can be fairly said that they are based on matters which were in issue at the trial. Since there is no report of the trial proceedings in the record, we assume that the trial court disposed of these factual issues properly.

Defendant had the burden of showing by his motion that the documents offered as newly discovered evidence were so conclusive as to probably change the result of the trial and retrial. People v. Marino, 388 Ill. 203. Principal reliance is placed upon the provisions of the agreement of April 29, 1933. The purpose of the agreement was to enable the National Surety Corporation of New York, hereinafter called the New Corporation, to assume the liabilities of the Surety Company under bonds and insurance contracts issued by the latter company. The New Corporation was organized for the purpose. Under the terms of the contract the New Corporation assumed liabilities under certain bonds and policies. The instant bond did not fall within that class. The defendant depends upon the provisions of Article VIII (c), IX (c) and X. The contract as amended provided in VIII (c) that the New Corporation should "take over the collection" of salvages and



recoveries of losses upon bonds where it had not assumed liability. It provided that the moneys collected should be for the account of the Surety Company, but that the proceeds might be retained by the New Corporation to be applied against its expenses incurred in connection with services rendered under the contract. The amount of the expenses were to be determined in future agreements. The New Corporation was to advance such moneys as the liquidator would require from time to time, not to exceed a certain amount. Article IX (c) provided that the Surety Company should transfer to the New Corporation its books, etc. relating to the business with respect to which the New Corporation was to render services. The Surety Company reserved the right to use, keep and have access to whatever books, etc. were transferred. Article X provided for the Surety Company to deliver at request to the New Corporation an assignment, etc. necessary to carry out the terms of the contract. We have read the contract and have studied the provisions relied on by defendant. Plaintiff refers us to provision No. VIII (h), giving the liquidator the right to dispense with the services to be rendered by the New Corporation under paragraph VIII on 30 days' notice.

We think it is quite clear that the introduction of this document at the trial would not have proved that the provisions relied upon constituted an assignment to the New Corporation of title to the claim against Sarelas. It follows that in our opinion, the defendant has not met his burden under the motion. Paragraph VIII of the agreement was clearly intended to constitute the New Corporation an agent for collection of indemnities. Gallagher v. Schmidt, 313 Ill. 40. Plaintiff, liquidator, retained title to the claim. In view of this conclusion it is unnecessary for us to consider the question whether defendant made a showing of due diligence

in discovering the documents. The court properly denied the motion of Seralas. Substantially the same points were made in his motion in arrest of judgment. The court properly denied that motion.

The defendant averred in his answer before the trial that plaintiff's claim was barred by the statute of limitations. We infer that the trial court decided this issue against the defendant. The issue is one of law since it can be decided on the uncontradicted dates appearing in the pleadings in the record here. The defendant contends that the statute began to run either on April 16, 1931, when the Tarjan judgment against him was affirmed in this court, or "soon after" September 28, 1931 when the Tarjan assignees sued the Surety Company. We see no merit to this contention. The judgment in favor of Tarjan's assignees against the Surety Company was affirmed in this court November 14, 1932. The judgment was paid beginning in January and ending in March 1933. The instant suit was filed September 4, 1942. It was not barred by the statute of limitations. National Slovak Society, etc. v. Matlocha, 307 Ill. App. 41; Gould v. Tilton, 161 Ill. App. 142; 27 Amer. Juris. pp. 469, 470.

For the reasons given the judgment and orders appealed from are affirmed.

ORDERS AFFIRMED.

BURKE, P.J. AND LEWE, J. CONCUR.

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44302

WILLIAM G. GALLOWAY,
Appellant,
v.
THE ATCHISON, TOPEKA AND SANTA
FE RAILWAY COMPANY, a corporation,
Appellee.

}
} APPEAL FROM
}
} SUPERIOR COURT
}
} COOK COUNTY.
}

335 I.A. 572²

MR. PRESIDING JUSTICE BURKE DELIVERED THE OPINION OF THE COURT.

William G. Galloway filed a complaint in the Superior Court of Cook County against the Atchison, Topeka and Santa Fe Railway Company alleging that the defendant negligently, carelssly, unlawfully and in violation of the Federal Safety Appliance Acts, failed and omitted to have an angle cock and its appliances in proper and reasonably safe operative condition; that it negligently, carelessly, unlawfully and for want of proper inspection, permitted the angle cock and its handle and appliances to be and remain so weak, unsafe and defective and in such unsafe operative condition that the handle broke off while being manipulated by the plaintiff in the usual and ordinary manner of its intended and necessary use; and that directly and proximately in consequence of the negligence of defendant and its failure to comply with the safety appliance statutes, he was severely and permanently injured. Issue was joined. A trial before the court and a jury resulted in a verdict finding the defendant not guilty. Plaintiff's motions for judgment notwithstanding the verdict and for a new trial were overruled and judgment was entered on the verdict. Plaintiff appeals.

Plaintiff lived at Oklahoma City, Oklahoma. He was born on September 8, 1904. He went to work for the defendant as a switchman, after a physical examination on April 12, 1945. He is married, six feet two inches tall and normally weighs around 200 pounds. His duties were the duties of an ordinary field man. At midnight on Christmas Eve, 1945 he went to work at the Nowers Yard of the defendant at Oklahoma City. The crew on that night consisted of the engine foreman, Burrell Carson, another switchman, T. B. Sheehan, pin puller, Dick Simmons, the engineer, and Mr. Smith, the fireman. Plaintiff took his orders from the foreman and the foreman received them from the dispatcher. Plaintiff was equipped with an electric lantern. About 1:00 a.m. the crew was making up a small train on track No. 3. Plaintiff rode a tank car on track No. 3, four or five car lengths before it was stopped by a hand brake on the south end. He got off the south end on the west side and walked to the north end of the tank car, walking between tracks Nos. 2 and 3. A locomotive and box car came in and made a joint (coupled) before plaintiff was behind the tank car. The coupling having been made, the switching operation was then completed. The train now consisted of the locomotive at the south end headed north, the box car next to the locomotive, and the tank car at the north end. The next movement was the train operation to which the Power Brake Statute applies. All that remained to be done to start the train movement was to close the angle cock at the rear of the tank car, signal the engineer to cut in the air and start the train. The angle cock is one of the appliances of the automatic brake system. Plaintiff testified that he

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got off the south end, walked to the north end of the tank car where he walked in close so he could hook up the air and have the air main line go through; that he found the angle cock valve open; that to have air in the two cars it is necessary to close the angle cock by lifting the handle and turning it counterclockwise; that the valve where the air line comes through was right at the end of the tank car; that the angle cock was fastened below the end of the air line, slightly to the side of the middle; and that to raise the handle one must step between the two rails. Plaintiff was going to close the valve at the north end of the tank car so that air could be put into the box car and the tank car. The purpose of this was to have the brake hooked to the main line. When the air line is connected up the engineer "takes care of the braking."

Plaintiff testified further that he raised the angle cock handle four or five inches, endeavoring to close it by turning it counterclockwise; that he tried it with his right hand; that it did not turn; that he then stepped in close, braced his foot, put both hands on the handle and pulled as hard as he could; that the handle broke off; that plaintiff fell into a corner of the tank car and hit below the back of his neck and head; that the next thing he remembered was when he woke up in St. Anthony's Hospital around 3:30 a.m.; that when he woke up he had knots on the back of his head the size of a hen's egg, the worst one right back of the head; that it stayed with him for a month; and that he also had other bruises. He was in St. Anthony's Hospital four days and was then taken to the Santa Fe Hospital in Topeka, Kansas, where he remained about three weeks and then went home. At the Topeka hospital he was given pills

to make him sleep. He stated that he had severe headaches then and since at all times; that he has not since then been able to use his left arm; that he cannot see to amount "to anything" from his left eye; that he has a little movement in his left arm at the shoulder, but has no use of his hand or arm; that when he left the Topeka hospital and went home his left arm was partially paralyzed; that the left side of his face, the neck and the neck muscles were paralyzed so as to interfere with turning his head; that he suffered about the same pain in both hospitals when he was not full of whatever they gave him; that his weight went down to 175 pounds; that he has not done any work since his injury; that there was paralysis in his left arm from the time he woke up; that he could not lift any weight with the left arm; that in the last six months (previous to the trial) his arm "has gotten worse"; that he was unable to sleep more than 45 minutes or an hour at a time; that he was unable to sleep on his left side; that his wife took care of him at home; that the pain in his head sometimes became unbearable; that his wife called a physician to take care of him; and that since the occurrence he has had nosebleeds. He testified further that during his railroading experience he had handled angle cock valves at all times; that some worked harder than others; that he had to use both hands to open and close them; and that the valve at the time of the mishap was the only one that he could not close.

The switchman, Burrell Carson, called by plaintiff, testified about the work of the switching crew that morning and the finding of plaintiff in a dazed condition about 10 feet from where he should have turned the angle cock between tracks Nos. 2 and 3, with his head to the south and his left arm up in the air with the angle cock handle in his left hand;

that witness tried to talk to him but he just groaned; that he, Carson, (later) took the angle cock handle, compared it with the broken part on the car and found that it had been broken off right in the eye; that plaintiff was taken in the locomotive to the yard office; that he helped move him to the ambulance; that all of this took about an hour and 20 minutes; that plaintiff's condition remained the same; that he "could not get anything out of him"; and that he talked to him two days later at St. Anthony's hospital. Carson testified further that it was necessary for the angle cock to be closed at the north end of the car to cut air into the car so that it would be under control of the engineer; that the angle cock handle must be 10 inches long and that Sheehan took it out of his hand; that he did not know what happened to hurt plaintiff; that he did not actually see anything happen to plaintiff; that he had no knowledge as to how the angle cock may have broken; that he does not know whether the angle cock broke while plaintiff was pulling on it or not; that he examined the angle cock to see if it was cracked or loose, but found the break fresh and bright just like it had just broken.

Thomas Sheehan who was the pin puller switchman, corroborated the testimony of plaintiff and Carson as to the work and movements of the switching crew that morning. He testified that it was dark; that they were working with the lights; that it was plaintiff's duty to close the angle cock at the north end of the tank car; that witness "made the joint" at the south end of the tank car; that he found plaintiff upon the ground on the west side at the north end of the tank car, between the tracks; that plaintiff still had the

angle cock in his hand; that he knew plaintiff had the broken angle cock handle in his hand and that it came off of the north end of the oil car; that Carson called the yard master, who helped put plaintiff in the engine cab; that they brought him to the yard office, put him in an ambulance and took him to the hospital; that witness did not go to the hospital; that witness never saw the angle cock on the north end of the tank car until after he saw plaintiff on the ground; that the angle cock handle looked like it was freshly broken; that he did not see plaintiff fall or see what happened to him; and that he could not swear "either way" whether the angle cock had anything to do with plaintiff's falling.

Plaintiff urges that the proximate cause of his injuries was the failure of defendant to comply with the Federal Safety Appliance Acts which gave the plaintiff an absolute right of recovery for any injury sustained by him. The statutory liability is not based upon the carrier's negligence. The statute has been construed so as to give a right of recovery for every injury, the proximate result of which was a failure to comply with the act. Defendant insists that plaintiff did not prove failure of the defendant to comply with the Safety Appliances Act. Plaintiff contends that it is undisputed that he was injured while employed by the defendant. Defendant answers that it has always denied that plaintiff was injured while he was working for the defendant. We are satisfied that there was an issue as to whether plaintiff was injured while he was employed by the defendant. Plaintiff recognized this by submitting that issue to the jury. He induced the court to give instructions requiring the jury to determine that issue. He also induced the court to submit to the jury a

special interrogatory reading: "Did the defendant at the time and place in question fail to maintain the angle cock in a reasonably safe and efficient operating condition?", to which the jury answered: "No." If plaintiff believed that there was no factual issue as to liability, he should have moved to take that issue from the jury. The jury is a trier of facts. If the uncontradicted evidence established defendant's liability and the court so determined, the only issue for the jury would be as to the damages. Plaintiff, having induced the court to submit the issue of liability to the jury, is not in a position to raise that question in this court. We do not understand that plaintiff contends that the court erred in requiring the jury to answer the interrogatory which he submitted. Furthermore, we find that there was sufficient evidence on which to submit the question of liability for the determination of the jury.

Plaintiff argues that the judgment is against the manifest weight of the evidence. We cannot agree with this contention. The record supports the statement of the trial judge that the verdict was in accordance with the weight of the evidence.

Plaintiff states that the court committed reversible error in giving defendant's instruction No. 14 as follows:

"The jury are instructed that one mode of impeaching a witness is by showing that the witness has made different and contradictory statements on the same point on former occasions. If it appears from the evidence in this case that any witness has been impeached in this manner, the jury have a right to take into consideration such impeachment in determining the value of the testimony of such witness or witnesses."

There was credible evidence from which the jurors could find that plaintiff had falsified his testimony as to his injuries.

The instruction complained of is not in good form. We are satisfied, however, that under the record it did not harm plaintiff and that the giving of it is not reversible error.

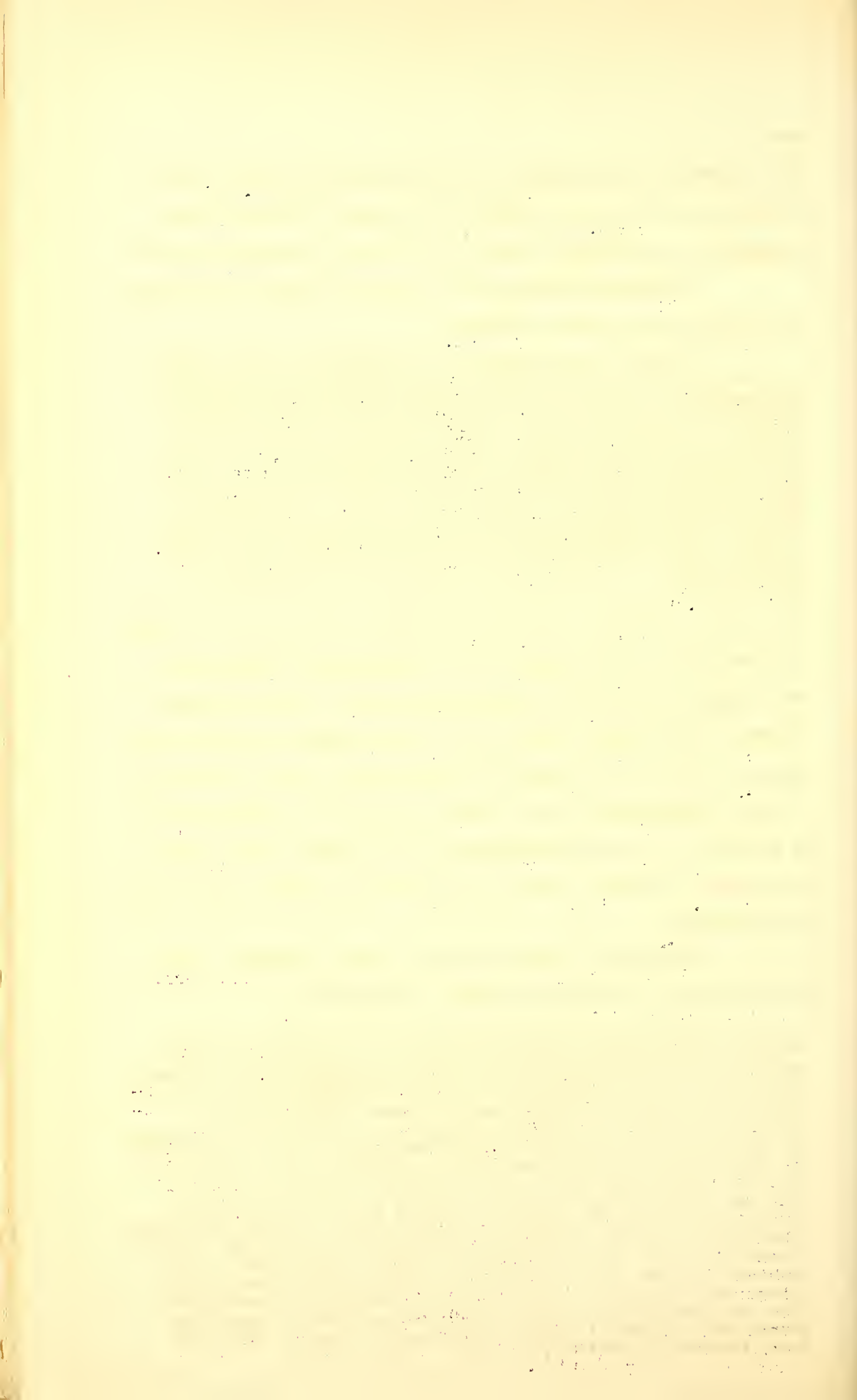
Plaintiff contends that the court erred in refusing to instruct the jury as follows:

"You are instructed that regardless of the place plaintiff's cause of action arose, or where he was working, or residing at the time he met with his alleged injuries, that he has a legal right to maintain his action in this court and to have the same tried in this court, and that it is the duty of the jury to give this case the same fair and impartial consideration that you would be required to give any case triable in this court if you were selected and constituted the jury therein; and it is your duty to return a just verdict, and one that is based upon the law, as given you by the court and upon the evidence which has been received and permitted to stand as the evidence in this case."

The proper portions of this instruction were covered by other instructions. The portion of the instruction dealing with the right of plaintiff to bring his action in the Superior Court of Cook County related to no issue which was before the jury. There is no contest on that question. Any contest as to the jurisdiction of the court to hear the matter would be a question for the determination of the court, and not for the jury. The trial court was right in refusing to give this instruction.

Plaintiff asserts that the court committed error in refusing to give the following instruction:

"You are instructed that under a certain statute of the United States, commonly known as a 'Safety appliance statute,' it was the duty of defendant railroad not to operate the train involved in this case without having the automatic train brake or power brake system with which said train, including the engine, locomotive and cars was equipped, so that the automatic air brakes throughout this train could be operated and controlled by the engineer of the locomotive drawing such train; and you are further instructed that it was the duty of the defendant to have said automatic air brake or power brake system in proper and efficient operating condition. You are further instructed that the angle cock, which plaintiff was attempting to close at the time he was injured was one of the component parts or appliances of the power brake system of the train, and that it was necessary that said angle cock be in proper and efficient operating condition in order to permit defendant to comply with the duty imposed by statute."



The subject matter of this instruction was covered by plaintiff's given instruction No. 10. The court did not err in refusing to give it.

Plaintiff maintains that it was error to cross-examine him upon irrelevant and immaterial issues, to admit such evidence and to try the cause upon collateral and immaterial issues. An examination of the record discloses that plaintiff, through his attorneys, made only one objection upon which they were overruled. A litigant may not complain upon appeal of things to which objection was not made in the trial court. In Union Drainage District v. Hamilton, 390 Ill. 487, the court said (495):

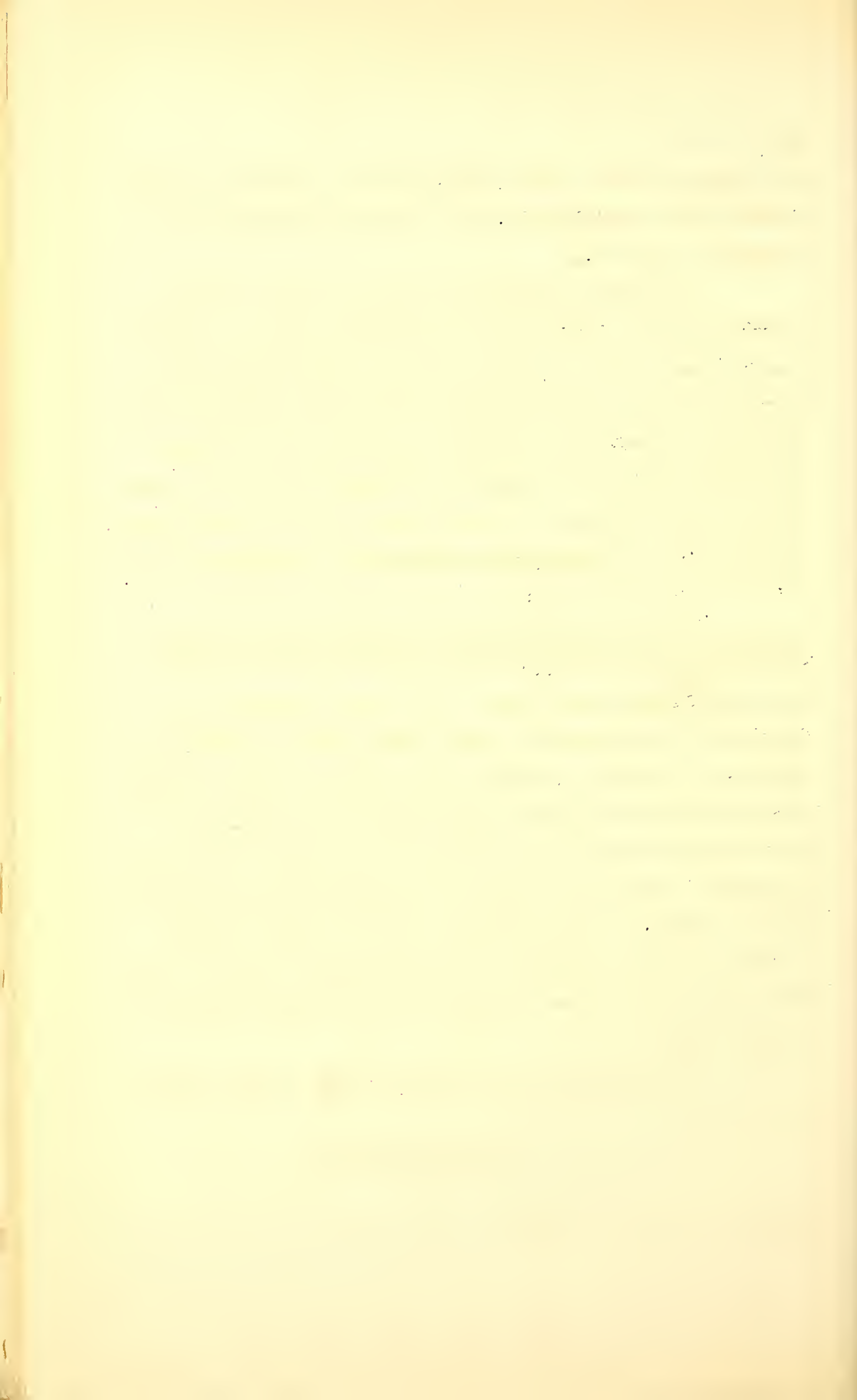
"It is too fundamental to require the citation of authority that an objection cannot be raised for the first time in a court of review."
agree

We cannot ~~with~~ plaintiff that he was cross-examined upon irrelevant and immaterial issues. There were two issues in the case. The first concerned the liability of the defendant and the second the claimed injury alleged by plaintiff to have been sustained by him. Defendant presented evidence of successive misrepresentations and falsifications indulged in by the plaintiff. The contention that the court received evidence of, that plaintiff was cross-examined upon and that the case was tried upon irrelevant and immaterial issues, is without merit.

The judgment of the Superior Court of Cook County is affirmed.

JUDGMENT AFFIRMED.

KILEY AND LEWE, JJ CONCUR.



44482

GERALDINE LEWAND,

Appellant,

v.

RAYMOND LEWAND,

Appellee.

APPEAL FROM

CIRCUIT COURT,

COOK COUNTY.

335 I.A. 573

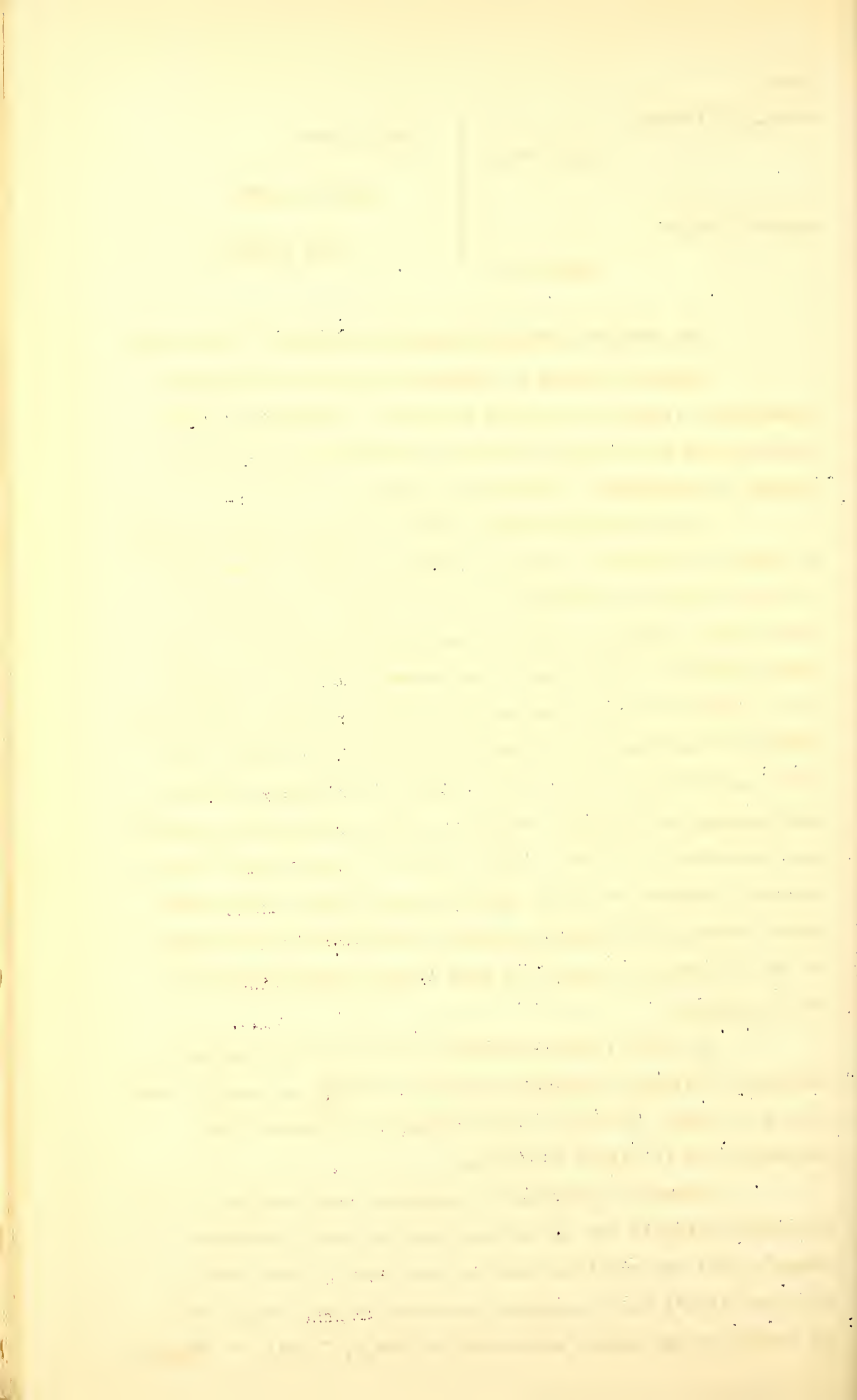
MR. JUSTICE LEWE DELIVERED THE OPINION OF THE COURT.

Plaintiff filed a complaint for divorce alleging desertion. Issues were joined and upon a hearing the chancellor found the issues in favor of the defendant and dismissed the complaint. Plaintiff appeals.

The evidence discloses that the parties were married on March 5, 1944 and separated on May 8, 1946. At the time of their marriage defendant was in the Army. Immediately after being discharged from the Army defendant went to live with plaintiff at the home of her parents, where he resided for a period of about five months until the alleged desertion. During his service in the Army defendant sent plaintiff the total sum of \$1,800. She also received a Government allotment aggregating \$1,100. When the parties separated plaintiff gave defendant \$300 and he also owned two bonds which he subsequently cashed for \$306. She retained \$1,500. All during their marital relationship plaintiff admits that she refused, on one pretext or another, to have sexual intercourse with the defendant.

The sole issue presented is one of fact, whether defendant willfully deserted plaintiff without reasonable cause on May 8, 1946. On this issue versions of plaintiff and defendant are in direct conflict.

Defendant testified in substance that before he left he asked plaintiff "to go out and look for some furnished rooms"; that she replied, "she was not going to some small hole and live"; that on another occasion he said to her that he "would go and borrow some money on the G. I. Bill of Rights



and buy a home of our own"; that plaintiff objected because "she would not take on a home with a mortgage."

Defendant further testified that several days before their separation plaintiff told him she did not want him but that he "tried to talk her out of it"; that "on May 8 she took my clothes out of the closet and put them on the bed and told me to leave"; that afterward on several occasions he asked her "to go out with me so we could talk things over and she said she had her mind made up and if I wanted to know any more to call up her attorney"; that on June 6, 1946, at the Catholic chancery office in the presence of a priest he again asked plaintiff to resume marital relations, which she refused, and that she also refused "to go out and look for a home".

Plaintiff testified in substance that defendant was "inconsiderate and very jealous"; that the Sunday before he left he said he was leaving next Wednesday; "I said it was entirely up to him"; that in June of 1946 at the Catholic chancery office "a priest was trying to talk me into going back to live with him; I said 'no' "; that at this meeting defendant addressing the priest in her presence asked, "How about going back?" and "I said 'No.'"

Plaintiff further testified that it was "nauseating and repulsive" to have defendant around. Plaintiff's mother, father, and brother, called in behalf of plaintiff, all testified in substance that plaintiff treated the defendant kindly; that defendant quarreled with plaintiff, and that defendant displayed no affection toward her.

Plaintiff says the court erroneously decided the case on the theory that failure to consummate sexual relations was a cause for desertion, while defendant, on the other hand, denies that the absence of sexual relations was an issue in the case.

We are not unmindful of the rule announced in Fritz v. Fritz, 138 Ill. 436, upon which plaintiff strongly relies, that plaintiff's refusal without good cause to have sexual relations with her husband does not constitute willful desertion. But since this is one of the marital duties of plaintiff, we think the chancellor properly considered it along with the other facts and circumstances in evidence. In our opinion the chancellor could find from all the evidence that defendant did try to provide living quarters for plaintiff elsewhere but that plaintiff refused to leave the home of her parents; that plaintiff requested defendant to leave her parents' premises; and that defendant made a bona fide offer to resume marital relations after the separation.

The chancellor who saw and heard the parties and their witnesses was in a better position to determine their credibility than this court, and we are therefore not disposed to disturb his findings. (Brozina v. Wanda, 387 Ill. 46,)

For the reasons stated, the decree is affirmed.

AFFIRMED.

BURKE, P.J. AND KILEY, J. CONCUR.

44155

MORRIS A. SOKOLOFF, REUBEN SOKOLOFF)
and ABRAHAM M. SOKOLOFF, doing)
business as A & A BOILER & TANK)
WORKS,)

Appellees,)

v.)

HIGHWAY STEEL PRODUCTS CO., a)
corporation,)

Appellant.)

4 A
APPEAL FROM CIRCUIT
COURT, COOK COUNTY.

335 I.A. 573²

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

The defendant, Highway Steel Products Company, appeals from a judgment at law entered upon findings by the court in a trial without a jury, which awarded the plaintiffs, Morris A., Reuben and Abraham M. Sokoloff, doing business as A & A Boiler & Tank Works, damages in the sum of \$18,645.49.

The litigation arises out of the alleged nonperformance of a war contract by plaintiffs, evidenced by purchase order No. 12064, delivered by defendant to plaintiffs on February 17, 1945, and attached to a letter bearing date February 20 of that year. The purchase order and the accompanying letter were both received in evidence by stipulation of the parties. Under the order plaintiffs were employed for the purpose of welding 500 Exhaust Deflector Kits consisting of one right deflector and one left deflector, at \$81.10 per kit, which were used to armor the underbelly of tanks and to baffle flames from the exhaust of tanks. Tacked assemblies and parts were to be furnished by defendant, except welding rods, which were to be purchased by plaintiffs from defendant. All welding was to be done in accordance with Ordnance specifications 497-5 and procedures furnished by defendant. All dimensions were to

conform with drawings furnished by defendant, and all work was to be done subject to Ordnance inspection and acceptance. The order provided that 15 complete kits were to be welded per day for the duration of the contract. Plaintiffs had done this type of welding for defendant under prior purchase order dated November 28, 1944, which was canceled and superseded under the later agreement of February 17, 1945. Inasmuch as defendant contends, inter alia, that the writings, consisting of the letter with order attached, amounted in law to a "severable" contract, i.e., several distinct and separate items, we set forth verbatim the contents of the letter of February 20, 1945, directed to plaintiffs and signed on behalf of defendant by Hayes Robertson, its secretary and works manager, as follows: "Attached hereto is our Purchase Order No. 12064 for welding 500 Exhaust Deflector Kits Drawing No. 7058468 and 7058469. This order supersedes and cancels our Order No. 11603, dated November 28, 1944. It is understood that we are to deliver to you 60 tacked assemblies immediately and that we will provide you with additional kits in an equal number of those completed by you to the end that a delivery schedule of 15 kits per day may be maintained and to the extent that we receive raw armor plate from our source. It is our understanding that you will be able to deliver 15 completely welded kits per day within the next week or ten days." Defendant's letter contained the following postscript: "Any reduction in price on our prime contract on account of our price determination clause will not affect the price shown in this contract." The evi-

dence discloses that this order and letter were prepared by defendant as the result of a conference between the parties shortly before the contract was drawn, in which they had agreed to cancel a previously existing contract with reference to the welding of deflector kits. The order and letter thus constituted the entire agreement between the parties, there being no evidence of any further understanding as to when the contract was to be completed; and it is not disputed that the completion of the work was dependent upon plaintiffs' receiving complete kits and parts from the defendant ready for the welding operation.

The chancellor who heard this case patiently listened to the introduction of some 650 pages of testimony, from which it appears that at the conference preceding the delivery of defendant's authorization by letter with attached purchase order, the parties agreed that it would be necessary for plaintiffs to qualify additional welders under Army Ordnance requirements, and that plaintiffs would be able to deliver 15 completely welded kits per day within a week or 10 days following February 20, 1945, providing plaintiffs got the necessary parts from defendant. It will be noted that defendant's prime contract with United States Army Ordnance, dated November 20, 1944, contemplated completion of delivery by defendant some time in March 1945, but on February 17, 1945, the same date as the date of the instant order placed with plaintiffs, the schedule of delivery by defendant to Ordnance was changed, the final deliveries to be made by the defendant to Ordnance in May 1945, which was a considerable time after the cancellation by defendant of its contract with plaintiffs on April 3, 1945.

Upon delivery of the contract to plaintiffs they immediately began to qualify welders under the supervision of Carl Shparago, who had been employed for the special purpose of supervising and expediting the work contemplated under the agreement. Plaintiffs put into operation 12 new welding machines in 12 new welding booths. Edward W. Gietl, who was the inspector-supervisor for the Army Ordnance from January 1943 to the end of June 1946, testified that plaintiffs had in operation during the occasions when he inspected their plant while the work in question was going on, welding booths, new equipment, pneumatic chipping hammers, heating plant, ventilating system, etc. In operation also were air hammers, air lines and compressors, and approximately 3000 square feet of plaintiffs' plant were set aside for the welding operations performable under the contract.

On February 17, 1945 defendant shipped to plaintiffs for welding 30 kits, comprising 30 left and 30 right assemblies. Plaintiffs already had on hand one and one-half kits under the previous welding contract. On February 23, 1945 defendant delivered to plaintiffs 5 additional kits, and made delivery of other kits at various later dates. Thereafter plaintiffs welded kits and delivered them to defendant. The number of unwelded kits delivered by defendant to plaintiffs, and the number of kits welded by plaintiffs and delivered to defendant are set forth in the stipulation which appears in the abstract of record as follows: February 17, 1945, 30 kits; February 23, 5 kits; February 27, 15 kits; February 28, 15 kits; March 1, 15 kits; March 3, 10-1/2 kits; March 5, 10 kits; March 7, 7 kits; March 16, 5 kits; March 17, 5 kits; March 19, 10 kits; March 20, 4-1/2 kits; March 22, 5 kits; March 23, 5 kits; a total of 143-1/2; and the

plaintiffs shipped kits to the defendant, as follows: February 21, 1945, 6 kits; February 23, 8 kits; February 27, 17 kits; March 2, 9 kits; March 3, 6 kits; March 7, 13 kits; March 8, 6 kits; March 9, 8 kits; March 10, 15 kits; March 13, 8 kits; March 14, 2 kits; March 15, 7 kits; March 16, 4 kits; March 19, 1 kit; March 20, 4 kits; March 21, 5 kits; March 22, 5 kits; March 23, 6 kits; March 24, 6 kits; March 26, 4 kits; March 28, 3-1/2 kits; a total of 143-1/2 kits. It was further stipulated that the 30 kits delivered February 17 met the requirements of a delivery of 60 assemblies referred to in the letter dated February 20, 1945.

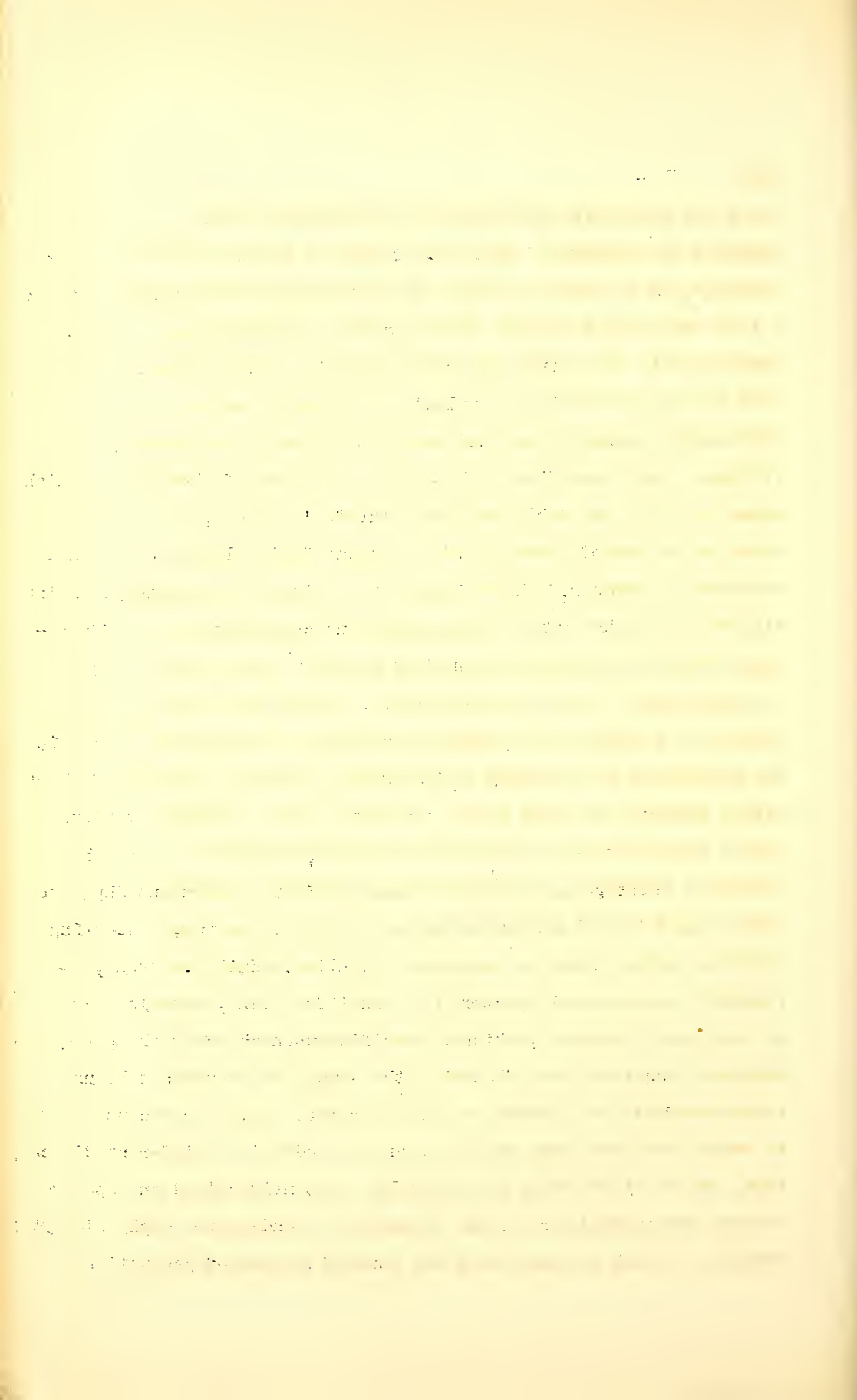
Under the terms of the contract defendant agreed that it would provide plaintiffs "with additional kits in an equal number of those completed" by the plaintiffs "to the end that a delivery schedule of 15 kits per day may be maintained and to the extent that we [the defendant] receive raw armor plate from our source." It is obvious, of course, that plaintiffs were not required to weld, and could not deliver, completed welded kits in excess of the number of assemblies sent to them by defendant. In other words, it would be impossible for plaintiffs to maintain a delivery schedule of 15 kits per day unless they received from defendant the requisite number of tacked assemblies and parts necessary to carry on the operation. Within 10 days after the delivery of the contract plaintiffs shipped to defendant on February 21, 1945, 6 kits; on February 23, 8 kits; and on February 27, 17 kits; or a total of 31 kits within one week from the effective date of the contract. In one week plaintiffs had thus arrived at a production and delivery of 17 kits in one day.

The agreement between the parties was abruptly terminated by defendant in a letter dated April 3, 1945, wherein Mr. Robertson, its secretary, stated that "this termination has been made necessary by the fact that your work has been sub-standard and not acceptable under the Ordnance Specifications, that your deliveries have been far below schedule, and that the conditions under which you have welded some parts have been contrary to Ordnance Specifications for armor plate welding." It therefore becomes important to first inquire whether plaintiffs were responsible for the failure of the delivery schedule contemplated by the parties. An examination of the schedule discloses the following facts: on March 10 plaintiffs shipped to defendant 15 welded kits and received none, the plaintiffs thus being short 9 kits on their back-log of 30 which the defendant agreed to maintain by its letter of February 20, 1945; on March 13, 1945 plaintiffs shipped 8 and defendant none, thus rendering plaintiffs short 17 kits on the back-log; on March 14 plaintiffs shipped 2 and the defendant none, and the plaintiffs were 19 short; on March 15 plaintiffs shipped 7, the defendant shipped none, and plaintiffs were short 26; on March 16 plaintiffs shipped 4 while defendant shipped 5 and the plaintiffs were short 25; on March 17 plaintiffs shipped none while the defendant shipped 5, and the shortage was reduced to 20; on March 19 plaintiffs shipped one while defendant shipped 10, and the shortage was reduced to 11; on March 20 plaintiffs shipped 4, defendant shipped 4-1/2, and the plaintiffs were short 10-1/2; on March 21 plaintiffs shipped 5, defendant shipped none, and plaintiffs were short 15-1/2; on March 22, plaintiffs shipped 5, defendant shipped

5, and plaintiffs were still short 15-1/2; on March 23, plaintiffs shipped 6, defendant shipped 5; and plaintiffs were short 16-1/2; on March 24 plaintiffs shipped 6, the defendant shipped none, and plaintiffs were short 22-1/2; on March 26 plaintiffs shipped 4, defendant shipped none, and plaintiffs were short 26-1/2; on March 28 plaintiffs shipped 3-1/2; defendant shipped none, and the plaintiffs were short 30 kits, having at that time none on hand. It can be seen from the figures above set forth that from March 10 to March 28 the defendant did not maintain the back-log that it had agreed to maintain under the provisions of the contract. In addition thereto, during most of this period the defendant itself made it impossible for the plaintiffs to weld 15 kits per day. It must be remembered that this was a contract to weld assemblies or kits sent by defendant to the plaintiffs, and unless these kits were sent by the defendant, no welding could be done by the plaintiffs. The figures above set forth show that from March 13 through March 28 the plaintiffs did not have 15 kits on hand at any one time. Therefore, by defendant's own act in failing to supply sufficient kits plaintiffs were prevented from welding, and they could not possibly weld, 15 kits per day.

There is also considerable evidence to the effect that the kits delivered by defendant to plaintiffs during the period from February 28 to and including March 9, aside from the requisite quantity, were incomplete as to certain pieces and parts. The kits contemplated as deliverable by defendant had to be complete in order that the welding operation might be performed according to specifications. All

the parts comprising the kits to be welded were to be supplied by defendant. There were about 45 parts to each assembly, or 90 parts per kit. The agreement provided for a left and right deflector which together comprised one complete kit. The right and left deflectors differed in that the sheet metal plate of each was required to be differently notched, bent and beveled to provide the proper fitting. This back plate was a piece of sheet metal which Anton J. Gihl, one of plaintiffs' welders, described as being of 22 gauge thickness and "a little thicker than a newspaper." When the first 30 kits were sent to plaintiffs, all the parts were laid out and counted by plaintiffs because they were then just beginning to operate under the new agreement. There is considerable evidence that from that time on there was a consistent shortage of pieces in the deliveries by defendant to plaintiffs, either of sheet metal, hardware or armor plate. As soon as the various pieces and parts were assorted and distributed and the shortages determined, plaintiffs' superintendent Shparago would call Friedman of the defendant company, requesting that the missing parts be supplied. Emil W. Murphy, defendant's inspector at plaintiffs' plant, was also advised of shortages, which he verified upon checking the parts. Shparago testified that the same plate could not be used interchangeably as a right or left deflector because to do so would place the fins and one edge in a different direction, and he stated that he constantly called and spoke to various representatives of the defendant to supply him with material so that he could keep the flow of production up to



normal and turn out the existing kits then on hand. Another witness, Benjamin Herr, a welder, testified that although he kept no record of the shortages, he did not always have the requisite right and left back plates, and that he was short about 50 per cent of the days. On one occasion he was even obliged to take one of plaintiffs' trucks and go to defendant's plant to get the material needed.

Defendant attempted to prove that the shortage of right or left back plates was of no consequence inasmuch as the plates could be interchanged by simple manipulation, and Gihl, one of the witnesses, attempted to show that it made no difference whether there were more rights than lefts because, as he stated, the sheet metal plate could be bent by hand and thus a shortage of right plates could be compensated for by a surplus of left plates, or vice versa. In the course of his examination he was handed a piece of sheet metal produced in court by defendant and requested to bend the plate by hand. He did not attempt this demonstration, but said he could probably accomplish the task with his feet, and proceeded to lay the sheet metal on the floor and tried to bend it with his foot and a piece of heavy board supplied by defendant. The result achieved is evidenced by this piece of sheet metal introduced as an exhibit. It was appropriately characterized by the trial judge as follows: "Well, it wasn't an artistic job. The sheet shows that."

We have referred in considerable detail to the evidence touching upon the alleged failure of plaintiffs to deliver welded kits in accordance with the scheduled re-

1. The first part of the document discusses the importance of maintaining accurate records of all transactions. It emphasizes that every entry must be clearly documented, including the date, amount, and purpose of the transaction. This ensures transparency and allows for easy verification of the data.

2. The second part of the document outlines the procedures for handling discrepancies. It states that any difference between the recorded amounts and the actual amounts must be investigated immediately. The document provides a step-by-step guide for identifying the source of the error and correcting it, ensuring that the records remain accurate and reliable.

3. The third part of the document discusses the role of the accounting department in providing financial reports. It highlights the need for timely and accurate reporting to management and other stakeholders. The document also outlines the format and content of these reports, ensuring that they provide a clear and concise overview of the organization's financial performance.

4. The fourth part of the document discusses the importance of maintaining proper documentation for all financial transactions. It states that all receipts, invoices, and other supporting documents must be kept in a secure and organized manner. This ensures that the organization has a complete and accurate record of all its financial activities.

5. The fifth part of the document discusses the role of the accounting department in ensuring compliance with applicable laws and regulations. It highlights the need for the department to stay up-to-date on changes in the regulatory environment and to implement appropriate controls to ensure that the organization remains in full compliance at all times.

quirements of the contract because it seems to us obvious from an examination of the record that plaintiffs' delivery was not below schedule through any fault of theirs'. The court who heard all the evidence made detailed findings of fact at the conclusion of the hearing, and on this phase of the case stated that "the evidence in this case shows *** that there was not a delivery in accordance with the obligation of the defendant company of the equivalent number of kits, and, in fact, at a certain period of time, several weeks before, substantially many days before the notice of cancellation or talked about cancellation, that there was hardly any reserve for the A. & A. Company to work on at all. As a matter of fact, on March 16th there were only three kits; on March 2nd, two; on March 18th, 8, and so forth and so on. But regardless of the amount that was on hand, there was not this delivery in accordance with the contract." Moreover it appears that defendant never sent a letter or advised plaintiffs orally or gave any other form of notice to them with respect to their alleged default, a circumstance which would strongly indicate that defendant itself was aware of its incomplete deliveries. The first notice of any claimed default appears in the letter of April 3, 1945, which was sent some 6 days after the last delivery by plaintiffs to defendant and 11 days after the delivery by defendant to plaintiffs of unwelded kits and at a time when plaintiffs had completed the welding on all assemblies and had no kits remaining on hand. Prior thereto deliveries of unwelded kits to plaintiffs by defendant and the continued receipt of welded kits by defendant from plaintiffs con-

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tinued without any objection or warning calling attention to any default or delay in a delivery schedule. This we think, as the trial court observed, constitutes a waiver of the right to strict performance.

As further ground for terminating the contract defendant in its letter of April 3, 1945 stated (1) that plaintiffs' work had been substandard and not acceptable under Ordnance specifications, and (2) that the conditions under which plaintiffs had welded some parts had been contrary to Ordnance specifications for armor plate welding. The first of these contentions is utterly untenable. Shparago testified that Murphy, the defendant's inspector in plaintiffs' plant, thoroughly inspected each kit and marked it with a special steel stamp, and that no piece was accepted by the defendant unless it was so marked. The kits and the welding operations thereon were also inspected by representatives of Army Ordnance, and it was shown that plaintiffs followed the required welding procedure. Gietl, United States Army inspector-supervisor for the Chicago Ordnance District, who had the duty of supervising inspection for the Chicago area, including this particular job, stated that he saw finished kits, that he was familiar with the applicable drawings and specifications, and that he was of the opinion that the kits were welded by the plaintiffs in accordance with such plans and specifications. He further testified that the practice adopted by the Ordnance with respect to complaints as to workmanship on war material was to report any such complaint to the resident inspector at the plant who would then take it up with the supervisor who, in this instance, would have

been Gietl, but he said that no complaint was made to him as to the quality of plaintiffs' work, and that all the kits welded were accepted by the Ordnance Department. Moreover, all the kits delivered by plaintiffs to defendant were paid for without remonstrance. With respect to this phase of the case the court found that "the defendant has failed entirely *** to prove that work *** done by the plaintiff in this case is sub-standard and not according to the Ordnance specifications. *** there isn't a word of testimony here that the government ever rejected one kit, and to the contrary, there is evidence here to the contrary, that the government inspector did visit this place and never had any complaints. *** The court [therefore] finds that the plaintiff company did not weld parts contrary to Ordnance Department's specifications for armor plate welding."

As to the second of these contentions, defendant sought to prove that the kits were welded in a room having a temperature less than the required 60-degree temperature, and through the testimony of Gihl and Murphy it sought to show that on two occasions the room temperature momentarily dropped to a point below 60 degrees. The drop in temperature below the required standard on only two instances was fully explained by plaintiffs' witnesses. On both occasions someone had pulled the switch, but no welding had been done during that time. There is no merit whatever to this contention.

The foregoing discussion is predicated on the assumption that there was a contract between the parties. Defendant contends, however, and devotes the major portion of its brief to the proposition that there was no contract,

and in support thereof sets forth numerous points, the principal one of which is: "If the part to be performed by one party consists of several distinct and separate items, and the price to be paid by the other is apportioned to each item to be performed, such a contract is severable; that is, it amounts in law to one contract for each unit, though the contract may be entire in form, and embodied in one instrument," and in support thereof its counsel cite some seven or eight Illinois decisions and textbooks on the law of contracts. Most of these authorities refer to the divisibility of a contract in connection with the question as to whether the seller or offeree may recover pro tanto for part performance, but none of them holds that under the circumstances shown the binding quality of the contract upon both parties as to the entire obligation is in any way impaired. It is a fundamental rule that where a contract exists, it is binding upon all the parties. The question usually raised in the various decisions cited by defendant was whether or not a party to a contract who had performed in part and who had not been paid could recover at the contract rate for part performance, and the question presented was as to the apportionment of price to performance.

But defendant goes so far as to argue that there was no contract between the parties because the acceptance did not meet and correspond with the terms and conditions of the offer, and it is even urged that there was no consideration. It would be impossible within the confines of this opinion to discuss these and other propositions urged at length. It suffices to point out that the agreement provided for a service operation upon 500 deflector kits, and that

the task imposed upon plaintiffs under the contract required the qualification of welders sufficient in number to perform the welding operations under the full number of kits contemplated, to install welding machines sufficient in number to weld not some but the full 500 kits, to purchase welding rods from defendant for all these units, to employ a superintendent for the express purpose of supervising and expediting the work, to set aside a large portion of its plant and provide facilities to effect the completion of the entire contract. The mere statement of these facts indicates that the agreement was obviously entire and indivisible so far as the respective obligations of the parties are concerned. We have heretofore set out verbatim the letter of February 20 attached to the order, and we think it would do violence to the law of fair construction to hold that this was not an entire contract and that there was no acceptance of the proposal. As a matter of fact plaintiffs operated under the agreement for many weeks and were paid for the work, and both parties at all times treated the letter and order as a clear and unambiguous agreement. In cases cited by plaintiffs the courts have invariably held that whether or not a given contract is entire or divisible in the sense that it enables one who partly performs to recover at the contract price depends upon the intention of the parties ascertainable, if possible, from the contract itself or, if the agreement be ambiguous, from the acts and conduct of the parties and the circumstances surrounding the transaction. Keeler v. Clifford, 165 Ill. 544; White Brass Castings Co. v. Union Metal Mfg. Co., 135 Ill. App. 32; Stanmeyer v. Davis, 321 Ill. App. 227. The trial court considered the principal legal contentions made by defendant, found that

this was a contract for 500 kits, and held that "this is not a severable contract." After a careful examination of the record we are convinced that plaintiffs made a conscientious effort to perform, and defendant's silence during the entire period of operations under the agreement until the sudden announcement of termination, is entirely inconsistent with the whole theory of its defense.

There remains only the question as to the proper ascertainment of damages by the court. Defendant argues that there can be no recovery for merely speculative, conjectural or possible profits; that in no event shall damages be awarded so as to put the plaintiff in better position than he would have been if the contract had been fully performed by defendant; and that the damages awarded were grossly excessive. However, plaintiffs make no claim for probable, conjectural or future profits. The contract before the court fixed a definite price, which, had the contract been performed, was definitely, not speculatively, payable to the plaintiffs, less the cost of production. On trial plaintiffs proved in detail their cost of production. Their original books of account and records were introduced in evidence without objection. They were then analyzed by a certified public accountant who testified as to the actual costs and expenses to plaintiffs of performing the welding job, taking into account the cost of material, direct labor, overhead and all other costs incidental to the production of the item. He then prepared a summary which was introduced in evidence. No countervailing proof was offered by defendant. As a result of these auditing operations it was shown that

1. The first part of the paper is devoted to a general discussion of the problem of the existence of solutions of the system of equations

which are satisfied by the functions $u_i(x, y, z)$ and $v_i(x, y, z)$ in the domain D of the space E_3 .

2. In the second part of the paper we shall consider the problem of the existence of solutions of the system of equations

which are satisfied by the functions $u_i(x, y, z)$ and $v_i(x, y, z)$ in the domain D of the space E_3 .

3. In the third part of the paper we shall consider the problem of the existence of solutions of the system of equations

which are satisfied by the functions $u_i(x, y, z)$ and $v_i(x, y, z)$ in the domain D of the space E_3 .

4. In the fourth part of the paper we shall consider the problem of the existence of solutions of the system of equations

which are satisfied by the functions $u_i(x, y, z)$ and $v_i(x, y, z)$ in the domain D of the space E_3 .

5. In the fifth part of the paper we shall consider the problem of the existence of solutions of the system of equations

which are satisfied by the functions $u_i(x, y, z)$ and $v_i(x, y, z)$ in the domain D of the space E_3 .

6. In the sixth part of the paper we shall consider the problem of the existence of solutions of the system of equations

which are satisfied by the functions $u_i(x, y, z)$ and $v_i(x, y, z)$ in the domain D of the space E_3 .

7. In the seventh part of the paper we shall consider the problem of the existence of solutions of the system of equations

which are satisfied by the functions $u_i(x, y, z)$ and $v_i(x, y, z)$ in the domain D of the space E_3 .

8. In the eighth part of the paper we shall consider the problem of the existence of solutions of the system of equations

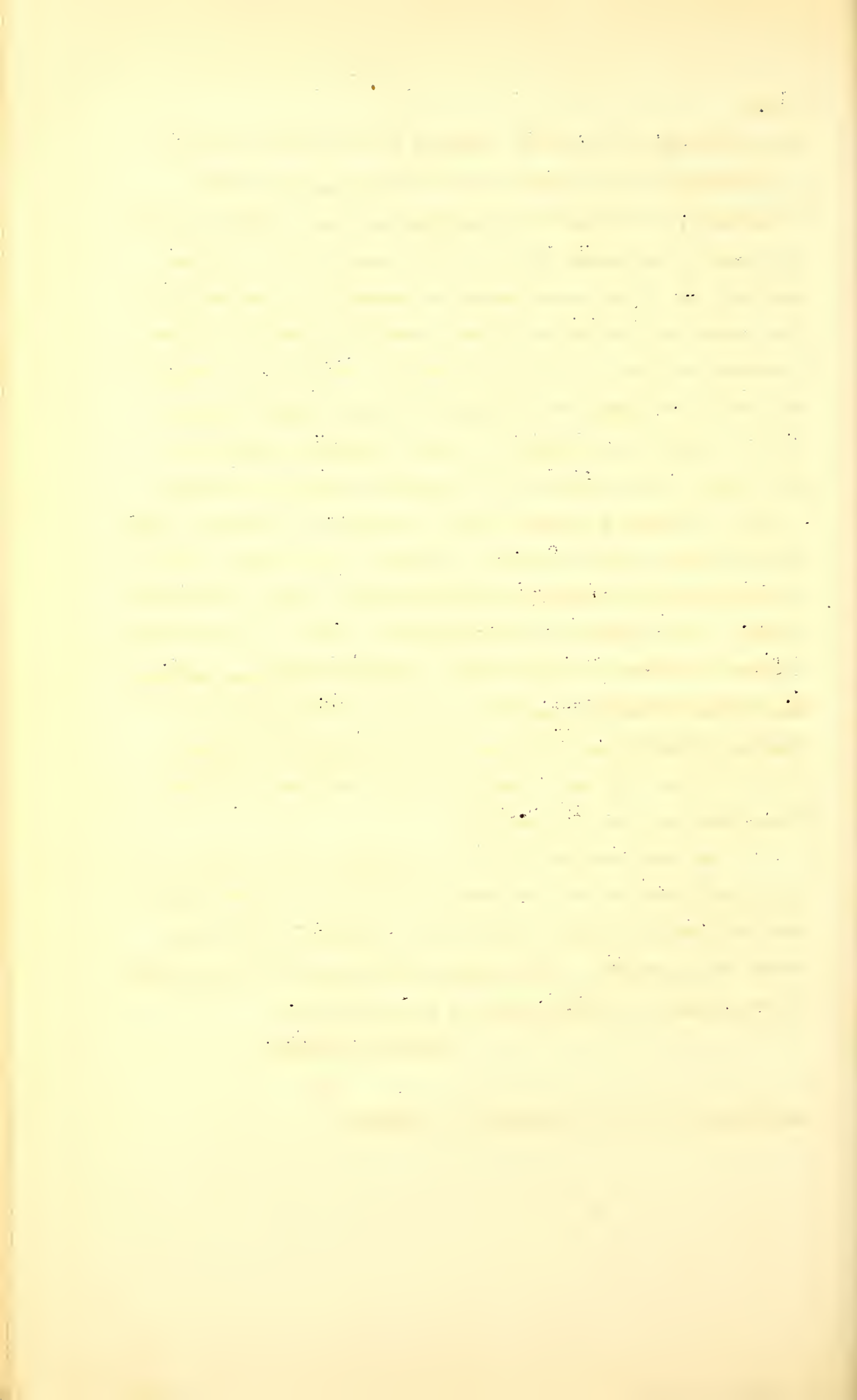
which are satisfied by the functions $u_i(x, y, z)$ and $v_i(x, y, z)$ in the domain D of the space E_3 .

the difference between the contract price and the cost of production had the contract been completed, was exactly \$18,645.49. Defendant's contention that the profit per kit was grossly excessive may be briefly answered by pointing out that the price agreed upon by contract was undoubtedly the result of careful preliminary consideration based upon previous dealings between the parties. Moreover, it should be pointed out that the difference between contract price and the cost of production does not constitute profits in the sense that plaintiffs will benefit to the full extent of the difference, because out of the award of damages plaintiffs either expended or will be required to expend costs of pre-production arrangements of set-ups and special installations. The method of ascertaining the damages is approved in various decisions of this state. Central Trust Co. v. John M. Smyth Merchandise Co., 222 Ill. App. 347; Billeter v. Halsam Products Co., 313 Ill. App. 145; Moore v. Schoen, 313 Ill. App. 367; and a summary of the doctrine in 15 Am. Jur., Damages, sec. 150 p. 560.

We have concluded that the findings of the court are fully sustained by the evidence, and that the various legal propositions applicable thereto were properly resolved in favor of plaintiffs. Accordingly the judgment of the Circuit Court should be affirmed, and it is so ordered.

JUDGMENT AFFIRMED.

Sullivan, P. J., and Scanlan, J., concur.



44183

FRANK J. CANTOW,
Appellant,

v.

LOUISE FOUTE,
Appellee.

APPEAL FROM SUPERIOR COURT,

COOK COUNTY.

335 I.A. 574¹

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

Frank J. Cantow brought suit in the Superior Court against his daughter Louise Foute for an accounting and the declaration of a trust. Defendant filed a motion to strike the complaint, which was sustained, and at the same time plaintiff had leave to file an amended complaint. When the amended complaint was subsequently filed, defendant filed another motion to strike. That motion was likewise sustained, the court thereupon entered judgment against plaintiff for costs, and this appeal followed.

The cause was determined solely upon the pleadings. The original complaint alleged in substance that on June 3, 1929 plaintiff was the owner of a brick bungalow located in Maywood, and that prior to June 6, 1933 he was the owner of an apartment building which was at the time in the process of foreclosure; that plaintiff was advised by his attorney that the foreclosure might result in a deficiency decree and a lien upon the Maywood property, and acting upon this advice, which was given in the presence of the defendant, plaintiff in February of 1933 caused the bungalow to be conveyed to defendant under an oral agreement that she would hold title to the property in trust for her father; that subsequently, on May 15, 1943, approximately ten years later, defendant, with plaintiff's consent, sold the premises so conveyed and invested the net proceeds, amounting to \$3957.00, in United States Government bonds; that these bonds were held by defendant until June 27, 1945, when she cashed some of them thereof invested the proceeds from said

The first part of the paper is devoted to a general discussion of the problem of the origin of life. It is shown that the problem is not only one of the most important but also one of the most difficult in the history of science. The author points out that the problem has been discussed since the earliest times, but it was not until the middle of the nineteenth century that it became a subject of scientific investigation. The author then discusses the various theories of the origin of life, including the theory of spontaneous generation, the theory of biogenesis, and the theory of abiogenesis. He then discusses the evidence for each of these theories, and he concludes that the theory of abiogenesis is the most plausible. The second part of the paper is devoted to a detailed discussion of the theory of abiogenesis. The author shows how the theory of abiogenesis can be derived from the laws of chemistry and physics, and he shows how it can be tested experimentally. He then discusses the various experiments that have been carried out to test the theory of abiogenesis, and he concludes that the theory is supported by the evidence. The third part of the paper is devoted to a discussion of the implications of the theory of abiogenesis. The author shows that the theory of abiogenesis has important implications for our understanding of the origin of life, and he shows that it has important implications for our understanding of the evolution of life. He then discusses the various implications of the theory of abiogenesis, and he concludes that the theory is a major contribution to the history of science.

sale, amounting to \$3100.00, together with an additional \$725.00 which plaintiff had turned over to her, in a certain real estate mortgage for him; that defendant now holds and refuses to deliver the mortgage to plaintiff; that plaintiff during all the foregoing period of time collected the rents from the Maywood premises, paid all the taxes and expenses of operation, and accounted for the income therefrom in his income tax return; and that defendant, until recently, admitted holding the remaining bonds and mortgage in trust for plaintiff. The complaint prayed that an accounting be had, that plaintiff have judgment against defendant for any sums found to be due plaintiff from defendant, and that an injunction order be entered restraining defendant from disposing of the aforementioned property.

Defendant's motion to strike, as shown by the abstract, contains the following: "it appeared upon the face of the complaint that the plaintiff was guilty of a fraudulent transfer for the purpose of cheating and defrauding his creditors and that he was not entitled to relief in equity."

The amended complaint alleged that plaintiff was on the third of June, 1929, the owner of a certain parcel of real estate which was improved with a brick bungalow; that on February 11, 1933 he and his wife conveyed the premises to their daughter Louise Foute by warranty deed, which was subsequently recorded; that the conveyance was without valuable consideration and made upon representations by defendant that she would hold title merely for the benefit of plaintiff; that in May 1943 defendant, with plaintiff's consent, sold and conveyed the premises to William C. Bliss, and that a cashier's check in the sum of \$3957.00, representing the net proceeds from the sale, was placed in a safety deposit box rented for that purpose; that subsequently this check was cashed and the proceeds or some part thereof invested in Government bonds

The first part of the paper is devoted to a general discussion of the problem. It is shown that the problem is of great importance in the theory of the structure of the atom. The second part is devoted to a detailed analysis of the experimental results. It is shown that the results are in good agreement with the theoretical predictions. The third part is devoted to a discussion of the results and their implications. It is shown that the results are in good agreement with the theoretical predictions. The fourth part is devoted to a discussion of the results and their implications. It is shown that the results are in good agreement with the theoretical predictions. The fifth part is devoted to a discussion of the results and their implications. It is shown that the results are in good agreement with the theoretical predictions. The sixth part is devoted to a discussion of the results and their implications. It is shown that the results are in good agreement with the theoretical predictions. The seventh part is devoted to a discussion of the results and their implications. It is shown that the results are in good agreement with the theoretical predictions. The eighth part is devoted to a discussion of the results and their implications. It is shown that the results are in good agreement with the theoretical predictions. The ninth part is devoted to a discussion of the results and their implications. It is shown that the results are in good agreement with the theoretical predictions. The tenth part is devoted to a discussion of the results and their implications. It is shown that the results are in good agreement with the theoretical predictions.

which were retained by defendant; that these bonds were purchased in accordance with an agreement between plaintiff and defendant, and thereafter some of them were sold and on June 19, 1945 the proceeds thereof, amounting to \$3040.00, were deposited in plaintiff's bank account in the Oak Park Trust and Savings Bank; that thereafter on June 30, 1945, at plaintiff's direction, a check was drawn on his bank account in the sum of \$3825.00 for the express purpose of purchasing for him a first mortgage upon the real estate of one H. L. Becker, and that defendant now has in her possession that mortgage and is collecting the interest thereon; that plaintiff has requested defendant to turn over the mortgage and accrued interest, together with Government bonds still in her possession, but that defendant has refused so to do, although she had at all times until recently declared that she held all the foregoing assets in trust for her father's use and benefit and that the same were his sole property; that during the time defendant held title to the real estate in question plaintiff collected the rents, paid the taxes and upkeep thereof, and accounted for the income therefrom in his income tax return. The prayer for relief in the amended complaint is substantially the same as that in the original pleading.

In defendant's motion to dismiss the amended complaint she alleges that the statements therein are "such that the plaintiff is not entitled to the relief asked for," and then makes the following allegation: "The plaintiff in his original complaint admitted that the transfer of the said real estate was made to the defendant for fraudulent purposes and that such purpose was to cheat and defraud his creditors. This court sustained the defendant's motion to strike the original complaint because of the admissions

on the part of the plaintiff as to his fraudulent purpose and scheme in conveying the property in question. After the court sustained the defendant's motion to strike the complaint the plaintiff asked leave to amend his complaint and he has now amended his complaint so as to omit his former admission of being guilty of fraud in said transaction. The present amended complaint filed in this court is a fraud on the court and does not help the plaintiff to evade his former admissions made in his original complaint."

The principal ground urged for reversal is that the court improperly considered the allegations of the stricken original complaint in passing upon defendant's motion to strike the amended complaint. In considering this point it will be noted that the amended complaint omitted that paragraph of the original complaint which alleged that plaintiff had been advised by his attorney in the presence of his daughter that there might be a possible deficiency judgment entered against him in the then pending foreclosure proceeding, and that therefore it would be advisable for him to convey to his daughter the premises described, to be held in trust for him. The amended complaint makes no mention of the property in the process of foreclosure, and there is not a single allegation therein relating to the possibility of a deficiency judgment or of the advice that plaintiff had received from his attorney. In all other respects the two pleadings are substantially alike.

In presenting their argument on this point plaintiff's counsel characterize the motion to strike as a speaking demurrer which introduces a new fact which is necessary to support the demurrer and which does not appear on the face of the bill. It is argued that the allegations complained of in the original complaint were no longer before the

court and could not properly be considered on the defendant's motion to strike. Several cases are cited in support of this proposition. In Wood v. Papendick, 268 Ill. 383, the court, in passing on a similar situation, said that "it is the settled law that it is not the office of a demurrer to set out facts. A demurrer involves only such facts as are alleged in the pleadings demurred to, and raises only questions of law as to the sufficiency of the pleadings which arise upon the face thereof. It merely tests the mode of statement in such pleadings." Likewise in Foss v. People's Gas Light Co., 241 Ill. 238, the court held that in determining the sufficiency of an amended bill, facts stated only in a cross-bill cannot be considered; that to thus bring extraneous facts into view would be in effect recognizing a speaking demurrer, which, it held, "is never allowable." Later, in Jennings v. County of Peoria, 196 Ill. App. 195, the court, in passing upon this question, held that a demurrer concerns such facts as are stated in the pleading demurred to, and that it is not the office of a demurrer to allege facts. If defendant in the case at bar wished to contend that the transfer was made for the purpose of defrauding plaintiff's creditors she should have set up facts tending to substantiate her contention in an answer so that the plaintiff could have had an opportunity to deny, justify or explain his course of action. The courts of New York state, in passing upon this question under a provision of their statute which is similar to a provision of our Civil Practice Act (Ill. Rev. Stat. 1945, ch. 110, par. 169) substituting a motion in the place of a demurrer, have held that on such a motion the original complaint cannot be considered (Peoples Bank of Hamburg v. Gates, 232 App. Div. 328, 250 N.Y.S. 452), and that only the complaint against which

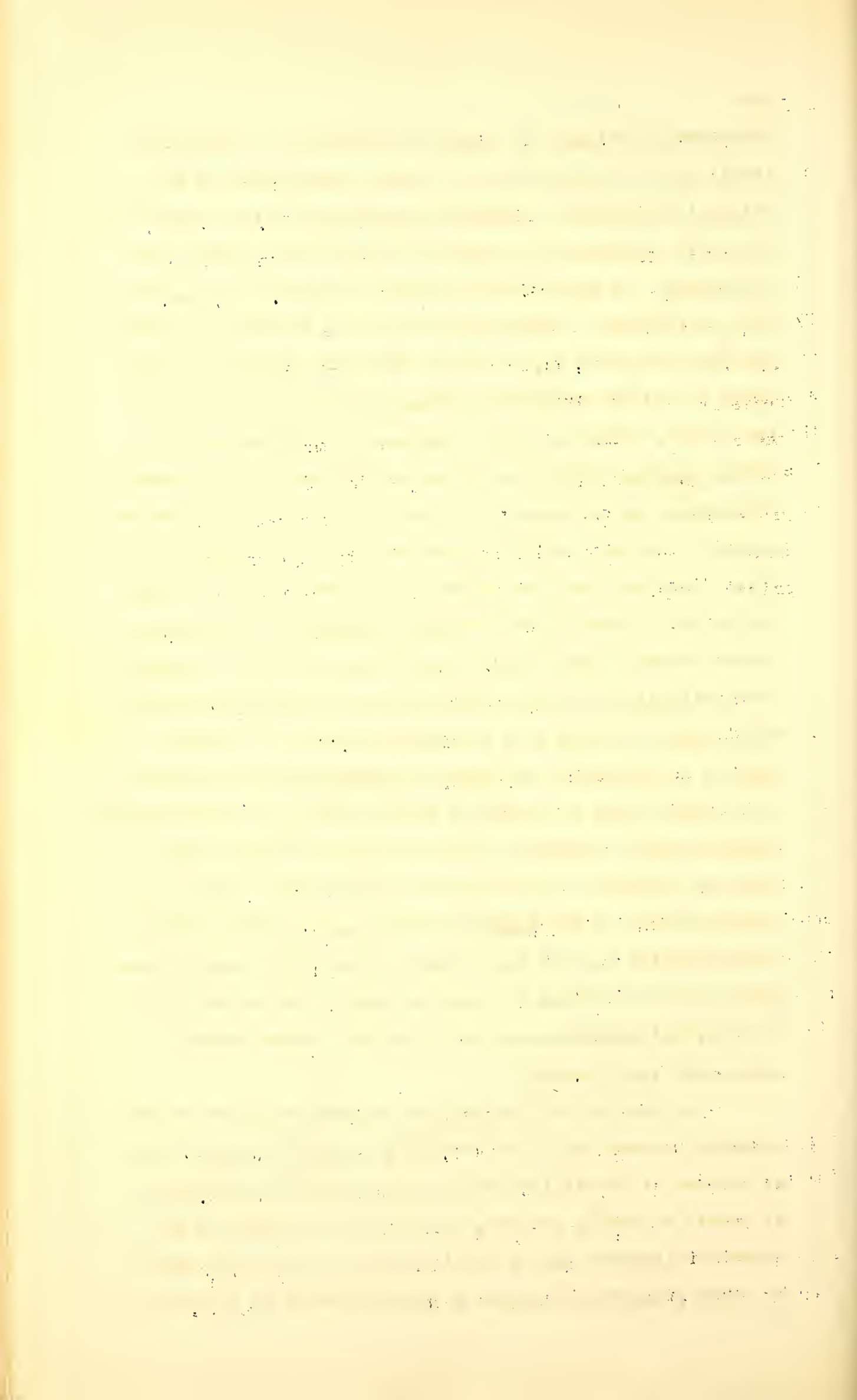
the motion to strike is directed, can be brought into view (Graves v. Whiteman, 146 Misc. 629, 263 N.Y.S. 592).

In reply to the foregoing proposition defendant insists that the court properly considered the allegations of the stricken original complaint, but the authorities upon which she relies do not sustain her contention. She argues that "the order entered by Judge McGoerty June 20, 1946, striking plaintiff's complaint *** still stands of record and there has been no appeal from said order by the plaintiff, and at the hearing of the second amended complaint before Judge Crowe the Court was without power to set aside the order entered by Judge McGoerty on June 20, 1946, and the plaintiff could not, by filing an amended complaint empower Judge Crowe to act as a Court of Review at the hearing to strike the amended complaint so as to affect any order entered by Judge McGoerty striking the original complaint, which order was entered June 20, 1946 ***." This argument is untenable. After Judge McGoerty had sustained plaintiff's motion to strike the original complaint, plaintiff had leave to file an amended complaint, which he did. That order could not have been appealed from because it was not an appealable or final order; nor is there any merit in the contention that Judge Crowe, in passing upon the defendant's motion to strike the amended complaint, would in effect be reviewing the previous order of Judge McGoerty striking the original complaint and allowing the plaintiff to file an amended complaint. All that Judge Crowe had before him was the amended complaint filed by leave of court, and we think he was without authority to consider the stricken pleading. The weakness in defendant's argument appears to arise from her failure to distinguish between an amendment to a complaint and the filing of an amended complaint, which is an entirely new and in-

The first part of the paper discusses the importance of maintaining accurate records of all transactions. It is essential for the business to have a clear and concise record of all income and expenses. This will help in the preparation of the tax return and in the event of an audit. The second part of the paper discusses the importance of keeping up to date with the latest tax laws and regulations. It is important to consult with a tax professional to ensure that the business is in compliance with all applicable laws. The third part of the paper discusses the importance of maintaining proper bookkeeping records. This will help in the preparation of the tax return and in the event of an audit. The fourth part of the paper discusses the importance of keeping up to date with the latest tax laws and regulations. It is important to consult with a tax professional to ensure that the business is in compliance with all applicable laws. The fifth part of the paper discusses the importance of maintaining proper bookkeeping records. This will help in the preparation of the tax return and in the event of an audit. The sixth part of the paper discusses the importance of keeping up to date with the latest tax laws and regulations. It is important to consult with a tax professional to ensure that the business is in compliance with all applicable laws. The seventh part of the paper discusses the importance of maintaining proper bookkeeping records. This will help in the preparation of the tax return and in the event of an audit. The eighth part of the paper discusses the importance of keeping up to date with the latest tax laws and regulations. It is important to consult with a tax professional to ensure that the business is in compliance with all applicable laws. The ninth part of the paper discusses the importance of maintaining proper bookkeeping records. This will help in the preparation of the tax return and in the event of an audit. The tenth part of the paper discusses the importance of keeping up to date with the latest tax laws and regulations. It is important to consult with a tax professional to ensure that the business is in compliance with all applicable laws.

dependent pleading. The amended complaint was complete in itself and does not refer to or adopt any portion of the original complaint. In Wright v. Risser, 290 Ill. App. 576, the court discussed at length the question here under consideration. It quoted with approval from 49 C.J. 558, sec. 773, as follows: "'An amendment which is complete in itself and does not refer to, or adopt, the prior pleading, supersedes it and the original pleading ceases to be a part of the record, being in effect abandoned, or withdrawn, and become functus officio, with the result that the subsequent proceedings in the case are to be regarded as based upon the amended pleading, which will not be aided by anything in the prior pleadings, and any ruling of the court with relation to the sufficiency of the original pleadings is not properly in the record,'" and from 21 C.J. 532, sec. 640 as follows: "'An original bill may be entirely superseded by an amended bill which in effect is a new original bill.'" The court went on to state that in Joiner v. Fowler, 133 Ill. App. 38, it was held "that by filing an amended bill, the complainants abandoned their original bill and transferred their whole cause of action to and merged it in the amended bill," and concluded that in the Wright case the only question before the chancellor was the sufficiency of the third amended complaint which was filed by leave of court after he had held the original complaint and the first and second amended complaints insufficient.

In view of the conclusions reached herein as to the principal ground urged for reversal, we deem it unnecessary to discuss at length two other points raised by defendant. It should be noted, however, that there is nothing in the record to indicate that plaintiff did not have other funds or other property from which a judgment could be satisfied,



and that in the absence of such allegations he may be presumed to have had a right to make the conveyance. Furthermore, it appears that the proceeds of the sale of Government bonds amounting to some \$3100.00, were withdrawn from plaintiff's bank account, and together with \$700.00 of plaintiff's money, were turned over to defendant for the express purpose of purchasing for him a first mortgage on Becker's real estate, and that the mortgage thus purchased with funds, at least part of which were indisputably plaintiff's, were retained by defendant under an express agreement to hold it for his use. According to the allegations of the amended complaint plaintiff's daughter consented to all these transactions, and she should not be permitted to prevail in this litigation upon the pleadings without being required to answer and stand trial.

Accordingly the judgment of the Superior Court is reversed and the cause is remanded with directions that defendant's motion to strike the amended complaint be overruled, that defendant be required to answer, and that such further proceedings be had as may be appropriate.

Judgment reversed and cause remanded
with directions.

Sullivan, P. J., and Scanlan, J., concur.

44194

MRS. JOSEPH HUNTSCHA,
Appellee,

v.

LAURENCE O'DONNELL,
Appellant.

)
)
) APPEAL FROM MUNICIPAL
)
) COURT OF CHICAGO.
)

3351.A.574²

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

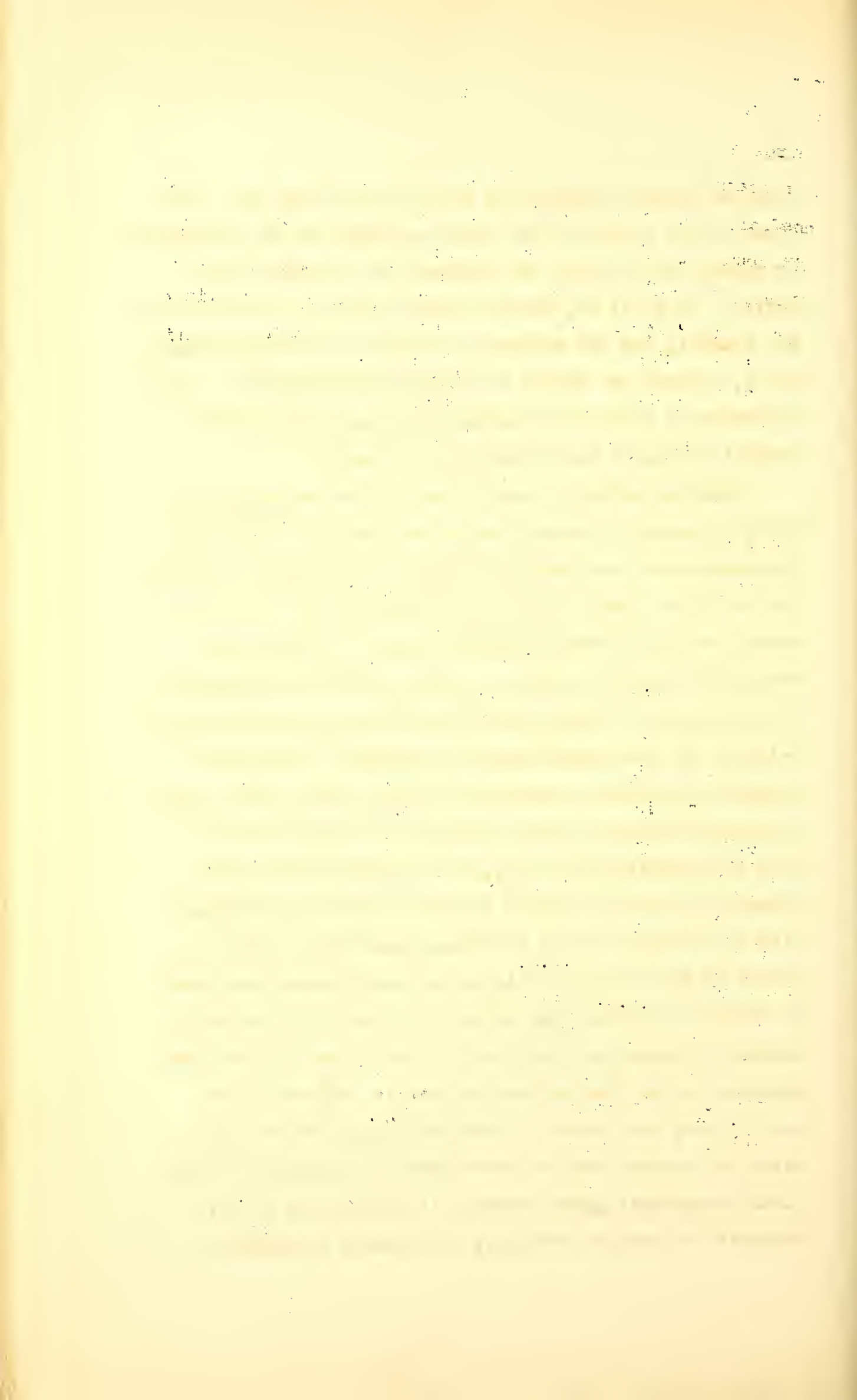
Defendant appeals from an order granting plaintiff possession of a second-floor apartment in a forcible-detainer proceeding tried in the Municipal Court. When the case was called for trial on April 25, 1947, counsel for defendant requested a continuance on the ground that defendant was ill, but did not present an affidavit in accordance with the rules of court. Plaintiff's counsel then advised the court that his client had on that day observed defendant, in apparent good health, leaving his apartment at the usual time of his departure in the morning. The court thereupon denied the motion for continuance and ordered the trial to proceed without a jury, no jury having been requested by either party. Two witnesses were heard on behalf of plaintiff, who were cross-examined by defendant's counsel. No stenographic record was made of the trial, nor any record preserved as to the testimony or exhibits introduced. Upon conclusion of the hearing, judgment was rendered in favor of plaintiff. No objection as to the jurisdiction of the court was raised by counsel at that hearing.

Subsequently, on April 25, 1947, defendant's counsel served a notice of motion upon counsel for plaintiff, without any petition attached thereto, stating that he would appear in court on April 28 and "move the court to

open the judgment entered on April 25, 1947 and hear evidence to the merits of the cause on behalf of the defendant."

> No ground for vacating the judgment was asserted in the notice. On April 28, 1947 defendant filed the affidavit of his counsel, and the motion was entered and continued until May 1, without any notice to counsel for plaintiff. On the afternoon of April 29 defendant served upon plaintiff's counsel a copy of the affidavit of defense.

When the motion to vacate came on for hearing May 1, 1947, defendant's counsel sought to retry the case by the introduction of testimony on behalf of defendant, and then, for the first time, raised the question of the service of notice under the Rent Regulations Act. The court, not having any record to which to refer, requested information as to plaintiff's compliance with section 6-d-1 and section 6-d-2 of the Rent Regulations for Housing. Plaintiff's counsel did not have with him in court at that time a copy of form D-8-notice, which he advised the court had been used in notifying the O.P.A., but testified that about February 12, 1947 he served a copy of notice of termination on defendant at his residence, and that a copy was served by mail on the O.P.A. in the usual manner and form. He further testified that on April 2, 1947 he filed suit against defendant on behalf of plaintiff, and at that time prepared O.P.A. form D-8 notice, had it stamped by the court clerk, and served it upon the O.P.A. immediately after his return from the court house by mailing it to the O.P.A. at 222 West Adams street. At the hearing May 1, plaintiff offered no evidence, her counsel contending



that it would have been repetitious.

Upon this state of the record three contentions are urged by defendant as ground for reversal. It is first argued that the court was without jurisdiction to enter the judgment of April 25, 1947. Defendant's counsel takes the position that proof of notice to the O.P.A. was a jurisdictional requisite, and that the judgment of April 25 was void for want of such proof; that forcible detainer is a purely statutory action in which jurisdiction is never presumed, and in which all jurisdictional requisites must appear on the face of the record if the judgment is not to be held void. Plaintiff's counsel insists that the proper notices were introduced at the original trial and received without objection. It appears from the abstract that the court evidently did not remember the case when it came up for hearing one week later on the motion to vacate, having in the interval heard so many other forcible-detainer proceedings, and merely inquired whether the proper jurisdictional proof of notice had been made at the hearing on April 25. It was then that plaintiff's counsel explained to the court what had happened at the original trial of the issues, and evidently satisfied the court that sufficient proof of the service of notice had been made on the original hearing.

In the course of procedure adopted at the hearing subsequent to April 25, defendant's counsel reiterated his insistence that the case ought to be retried, while counsel for plaintiff steadfastly objected. Nevertheless evidence

was introduced by defendant in excuse or extenuation of the alleged nuisances claimed to have been committed by defendant as affording ground for terminating the lease, but we are satisfied that the court at no time treated the subsequent hearing as a retrial of the case.

The initial difficulty arose when defendant's counsel asked for a continuance upon the representation that defendant's state of health would not permit him to appear in court. This representation was made orally and was to the effect that defendant was ill. When the trial judge was apprised by plaintiff's counsel that defendant had been seen leaving his apartment that morning in apparent good health and at the usual time, he refused to grant the continuance, and since no affidavit was presented as required by the rules of the Municipal Court, it was within the sound discretion of the trial judge to deny the motion for continuance and order the case to proceed for trial. As it developed later, the record discloses that defendant was not operated on for several days subsequent to April 25, and there was no showing made as to why his wife, who was charged with having committed the various nuisances, could not have been available as a witness at the original hearing. As a matter of fact, she did appear at the subsequent hearing and testified.

The first time defendant's attorney sought to prove that plaintiff had insufficient ground for terminating the lease because of alleged nuisances, was on May 1, when he appeared on a motion to vacate the judgment of April 25. He then sought to introduce testimony to show

that defendant was not guilty of any nuisances. However, that defense was not presented until after he made his motion to vacate. The case was never reopened, and the hearing on May 1 was confined solely to defendant's motion to vacate.

Whatever merit there may be to defendant's contention that the acts charged did not constitute a nuisance is of no avail because no abstract or report of proceedings of the trial of April 25 is presented to this court for review. The only testimony presented was that adduced upon the subsequent hearing, and should not have been admitted in view of plaintiff's objection thereto. In the absence of a report of proceedings we must presume that the service of notice on the O.P.A. in accordance with the Rent Regulations Act was sufficient and that the evidence presented at the trial on April 25 was ample to convince the court that a nuisance had been committed. Hamann v. Becklenberg (Abst.), 310 Ill. App. 385; Addante v. Pompilio, 303 Ill. App. 172; Kilpatrick v. Schmitt, 303 Ill. App. 15; and Bower, Inc. v. Silverstein, 298 Ill. App. 145.

Accordingly, the judgment of the Municipal Court granting plaintiff possession of the premises in question should be affirmed, and it is so ordered.

Judgment affirmed.

Sullivan, P. J., and Scanlan, J., concur.

44273

THE PEOPLE OF THE STATE OF ILLINOIS,)
Defendant in Error,) ERROR TO CRIMINAL
v.) COURT, COOK COUNTY.
HARRY RADDATZ,)
Plaintiff in Error.)

335 I.A. 575

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

Harry Raddatz comes up on writ of error from a judgment of the Criminal Court, entered pursuant to the verdict of the jury, sentencing him to the County Jail and imposing a fine of \$200.00.

The indictment upon which he was tried consisted of the following two counts: "Counts 1. The Grand Jurors, chosen, selected and sworn, in and for the County of Cook, in the State of Illinois, in the name and by the authority of the People of the State of Illinois, upon their oaths present that one Harry Raddatz late of the County of Cook, on the twenty first day of September in the year of our Lord one thousand nine hundred and forty six, in said County of Cook, in the State of Illinois aforesaid, then and there being a male person of the age of seventeen years and upwards, unlawfully and feloniously did take certain immoral, improper and indecent liberties with a certain child under the age of fifteen years and of the age of seven years, to-wit, one Mary Ternes, with the intent of arousing, appealing to and gratifying the lust, passions and sexual desires of said Harry Raddatz; and the Grand Jurors aforesaid, upon their oaths aforesaid, do further say that a more particular description of said immoral, improper and indecent liberties is too obscene and too gross to be spread upon the record of the Court; contrary to the Statute, and against the peace

and dignity of the same People of the State of Illinois. Count 2. The Grand Jurors aforesaid, chosen, selected and sworn in and for the County of Cook, in the State of Illinois, in the name and by the authority of the People of the State of Illinois, upon their oaths aforesaid, do further present that one Harry Raddatz late of the County of Cook, on the twenty first day of September in the year of our Lord one thousand nine hundred and forty six, in said County of Cook, in the State of Illinois aforesaid, knowingly, willfully and unlawfully did then and there do certain acts which then and there directly tended to render one Mary Ternes (then and there a female child under the age of eighteen years, to-wit: of the age then and there of seven years,) a delinquent child; that is to say, that said Harry Raddatz did then and there take certain immoral, improper and indecent liberties with said Mary Ternes which said acts of said Harry Raddatz then and there directly tended to render said child Mary Ternes guilty of indecent and lascivious conduct; and the Grand Jurors aforesaid, upon their oaths aforesaid, do further say that a more particular description of said immoral, improper and indecent liberties is too obscene and too gross to be spread upon the record of the Court: contrary to the Statute, and against the peace and dignity of the same People of the State of Illinois." Both counts were submitted to the jury, but defendant was found guilty only on the second count, the delinquency charge.

Aside from two legal propositions which we shall hereafter consider and discuss, defendant's principal con-

The first part of the paper is devoted to a discussion of the general principles of the theory of the structure of the atom. It is shown that the structure of the atom is determined by the laws of quantum mechanics, which are based on the principle of the uncertainty of the position and momentum of the particles. The second part of the paper is devoted to a discussion of the experimental results obtained in the study of the structure of the atom. It is shown that the experimental results are in good agreement with the theoretical predictions of quantum mechanics.

The third part of the paper is devoted to a discussion of the application of the theory of the structure of the atom to the study of the properties of matter. It is shown that the theory of the structure of the atom can be used to calculate the properties of matter, such as the density, the refractive index, and the specific heat. The fourth part of the paper is devoted to a discussion of the application of the theory of the structure of the atom to the study of the properties of the radiation. It is shown that the theory of the structure of the atom can be used to calculate the properties of the radiation, such as the intensity, the frequency, and the polarization.

The fifth part of the paper is devoted to a discussion of the application of the theory of the structure of the atom to the study of the properties of the molecules. It is shown that the theory of the structure of the atom can be used to calculate the properties of the molecules, such as the molecular weight, the molecular volume, and the molecular energy. The sixth part of the paper is devoted to a discussion of the application of the theory of the structure of the atom to the study of the properties of the crystals. It is shown that the theory of the structure of the atom can be used to calculate the properties of the crystals, such as the crystal structure, the crystal density, and the crystal energy.

The seventh part of the paper is devoted to a discussion of the application of the theory of the structure of the atom to the study of the properties of the solids. It is shown that the theory of the structure of the atom can be used to calculate the properties of the solids, such as the solid structure, the solid density, and the solid energy. The eighth part of the paper is devoted to a discussion of the application of the theory of the structure of the atom to the study of the properties of the liquids. It is shown that the theory of the structure of the atom can be used to calculate the properties of the liquids, such as the liquid structure, the liquid density, and the liquid energy.

X attention is that the evidence indicates that there was reasonable doubt as to his guilt, and the major part of his brief is devoted to a recital of the evidence. Briefly summarized, the evidence adduced upon the hearing discloses that the complaining witness, Mary Ternes, who was about seven years of age, resided with her parents at 6851 South Green street in Chicago, while defendant lived in the adjacent building. Mary had known defendant for several years. She testified that on Saturday afternoon, September 21, 1946, her mother gave her a dime with which to get an ice cream cone. She proceeded down the back stairway, intending to go out upon the street. When she reached the outside of the gangway alongside the building in which she resided, she observed defendant coming toward her but he said nothing, until she reached the street, when she observed him beckoning her with his hand. She then followed him through the areaway into the basement, where, she said, "he touched me under my pants." No one was there except defendant and the complaining witness, and the basement door was shut. Testifying further, she stated that the defendant "said to me that if I didn't tell my mother, he would give me a quarter. *** he touched me under my pants. I was wearing a dress, shoes and stockings. *** He touched me right here [indicating the region of the vagina]. I felt his hand touch me under my pants. He did that for about a minute and then I heard my mother coming. I didn't say anything to Mr. Raddatz that I heard my mother coming. Then Mr. Raddatz stopped touching me. When I heard my mother coming Mr. Raddatz stopped, I walked up the steps. *** When I stopped to talk to my mother,

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Mr. Raddatz was still down there." Mary stated that she then went up to their apartment with her mother and told her what had happened. The following day after the matter had been reported to the police, she was taken by the police to defendant's home, where the police asked her some questions and talked to defendant, who was then taken to the police station.

Mary's mother, Clara Ternes, testified that her daughter was seven and one-half years old on the day in question; that the family occupied the second floor rear at 6851 South Green street; that Mr. Ternes' mother and father occupied the first floor front; that there is a back entrance to their apartment, the descending stairs facing the alley to the east; that there is a basement entrance, the stairs of which face north; that she frequently had occasion to be in the basement, the door of which was always locked, and that it was necessary to use a key to enter; that on the afternoon of September 21 she served Mary her luncheon, and afterward gave her a dime to buy an ice cream cone; that between 3:00 and 4:00 P.M. Mary left the apartment, wearing a dress, underclothes, shoes and stockings. The witness stated that she was going downstairs to empty the garbage, and when she reached the ground level Mrs. Shanahan, her neighbor to the south, said something in a loud and excited tone of voice which caused her (Mrs. Ternes) to look in the basement stairway, where she saw defendant, but not Mary; that Mary had come out of the gangway, and defendant was then trying to open the basement door, which was shut; that she then had a conversation with her daughter, who told her what

had happened. She stated that she took Mary upstairs and asked her all about the trouble. Mr. Ternes was not home at the time and did not return until about midnight. Mrs. Ternes then talked to him, and the discussion between them was resumed the following day (Sunday). After returning from church Mr. Ternes called the police, who arrived about two in the afternoon and questioned Mary. The police officer later left the house with Mr. Ternes, and subsequently she and Mr. Ternes appeared at the police station.

Peter Ternes, Mary's father, testified that he was employed by a liquor store and worked until late on the day of the occurrence. Mrs. Ternes told him something of what had happened to Mary, but he did not call the police that evening. On the following day after returning from early mass, they discussed the matter further, and about twelve o'clock he proceeded to the police station and made a complaint there. Later that afternoon Officer Kearney came to their apartment and spoke to Mary, and then the officer, Mary and Mr. Ternes went over to Raddatz' home, where the officer talked to him. They were all in the kitchen at the time, and the officer asked Mary to tell what she had told at the Ternes' home. Mary then, in the presence of the defendant, repeated what she had told her mother. Kearney took defendant to the station, where Mr. Ternes signed a complaint. He had known defendant about eight years, during part of which they had lived in the same building. He stated that Mary had told him that defendant had put his hand on her privates; and that he was highly indignant.

Another witness, William Ternes, Mary's uncle, stated that he lived on the first floor of the building occupied by Mary's family; that he was home September 21 between the hours of two and three thirty in the afternoon; that defendant came into his apartment and talked to him and his mother; that defendant asked for the basement key, and that William Ternes' mother said that her husband had it; that defendant said he would like to get a hammer out of the basement, and when William's mother said that she had a hammer, defendant stated he would be back later, and left. He returned ten or fifteen minutes thereafter, and said he would let the work for which he wanted the hammer go until some other time.

The police officer, William Kearney, stated that he had been ordered to call at the Ternes' home, and upon his arrival he questioned Mary outside of the presence of her mother and father; that he then accompanied Mary and her father to defendant's apartment, where he talked to him in Mary's presence; that defendant said he did not mean to hurt Mary, and that he had not harmed her and was always good to her. Kearney took defendant to the police station, where he had Mr. Ternes sign a complaint for disorderly conduct. Subsequently the grand jury returned an indictment against defendant, but Kearney did not testify before the grand jury.

Mrs. Jewel Raddatz, defendant's wife, testified that on the afternoon of September 21 she had occasion to take some garbage from her apartment to the garbage box; that her husband was with her, and that they went out together and remained in the yard about five minutes, after which she re-

turned to their apartment; that she saw Mrs. Ternes in the yard at that time, as well as a number of children who were playing, and that she had previously asked her husband to go into the Ternes' yard to get some nails for her; that defendant was not in Mary's company during any part of that time, but was home all that afternoon and evening; that the first she heard about the occurrence was on the following afternoon when the police officer came to their apartment. The witness testified that Mary at no time made any statement accusing defendant, and made no complaint to the officer of any indecent acts committed on the preceding afternoon. Defendant asked the officer why he was arrested, and the officer told him that it was for molesting Mary.

Defendant, testifying in his own behalf, stated that he was 52 years of age, had lived in Chicago all of his life, had worked for the Chicago Surface Lines for 26 years as a motorman, and then took his pension; that at the time of the occurrence he was employed as a warehouse superintendent; that he had been home all day on the Saturday in question, working around the house; that he had known the Ternes family for several years, had seen Mary grow up, and that she and other children frequently played in the yard; that he had occasion to be in the yard that afternoon, but had not beckoned to Mary, nor had he taken her by the hand and led her to the basement. He denied that he had lifted her dress, or taken any liberties with her privates. He stated that Mrs. Ternes never accused him of improper conduct while she was in his presence, or in the presence of Mary, and that the officer had not asked Mary to accuse him of indecent liber-

ties in his presence.

Upon this state of the record defendant contends that the evidence clearly shows that there was a reasonable doubt as to his guilt. He seeks to find flaws in the testimony of Mary and her mother, and challenges their credibility as witnesses. On behalf of the state there was the testimony of the complaining witness, Mary Ternes, that defendant took her to the bottom of the stairs leading to the basement and there placed his hand under her pants in the region of her vagina, and told her he would give her a quarter if she did not tell her mother; and there was also the testimony of Mary's mother that she came upon the scene immediately thereafter and saw defendant at the bottom of the stairs and her daughter ascending the stairs; that Mary then told her that defendant had done something to her, and later in her home under questioning repeated what had occurred. Defendant denied the charges, and his wife sought to corroborate his evidence by her testimony.

The question presented for the jury's consideration was whether or not defendant had committed the acts testified to by the complaining witness and her mother. The jury heard and saw the witnesses and were in a position to determine what weight to give their testimony. In People v. Martin, 304 Ill. 494, the court, under similar circumstances, said: "As we have seen, there is no error in the record upon which a reversal can be based. *** Plaintiff in error, if not guilty, is, indeed, most unfortunate. Either the State's witnesses were mistaken in their identification or plaintiff in error's witnesses were mistaken as to the day on which they testified

he was at home. The issue was one peculiarly for the jury. The record contains no errors of law. Even though it might be said that this court, hearing the evidence in the first instance, would have arrived at a different conclusion, yet it cannot be said, under the condition of this record, that the jury were not justified in returning a verdict against plaintiff in error. It becomes the duty of this court, therefore, to affirm the judgment, and the same is done accordingly." The case was fairly tried, and we would be unjustified in holding that defendant was not proved guilty of the crime charged beyond a reasonable doubt. It is true that in cases of this kind the court is required to carefully examine the evidence in order to satisfy itself that the verdict is not the result of passion or prejudice on the part of the jury, but there is nothing in the trial of this case upon which such a charge can be predicated.

Two legal propositions are urged as additional ground for reversal. It is first contended that count 2 of the indictment, the only count upon which the defendant was convicted, "does not allege facts that constitute any offense provided by the Criminal Code of Illinois, and therefore the motion in arrest of judgment by the defendant should have been sustained." This count charged that the child, Mary Ternes, was seven years of age, and that defendant took certain immoral, improper and indecent liberties with her which directly tended to render said child guilty of indecent and lascivious conduct. Defendant's counsel argue that an infant under the age of ten years shall not be found guilty of any crime or misdemeanor, and relies upon section 591 of the Criminal Code (Ill. Rev. Stat. 1945, ch. 38) which contains such a provision, and two decisions, Angelo v. People,

96 Ill. 209, and Maskaliunas v. C. and W. I. R. R. Co., 318 Ill. 142, as authority for the proposition. The first of these decisions merely holds that under the statute then in force (Revised Statutes, 1874, p. 394, sec. 283) an infant under the age of ten years is incapable of committing crime and cannot be convicted of any crime or misdemeanor, and that on a charge of homicide against an infant little more than eleven years old, the legal presumption being that he was incapable of committing the crime, it devolved upon the People to make clear proof of capacity before conviction could be had, and without such proof a judgment of conviction should be reversed. In the other case plaintiff, a child under ten years of age, sought to recover against the railroad company for injuries sustained by him due to the company's negligence. The railroad company contended that there was no evidence in the record tending to show that the absence of a fence along the right-of-way contributed to or proximately caused the injury to the child, but that the child's own act in climbing on the moving train was the proximate cause of the accident. The court held that the statute (ch. 38, sec. 103) making it a misdemeanor to climb upon a railroad car without permission had no application to the child because he was under the age of ten, and that notwithstanding that the statute was general in its terms it must be construed in connection with the statute here invoked, declaring a child under the age of ten years incapable of committing a crime. The precise language of count 2 in the indictment in this proceeding stated that defendant "knowingly, wilfully and unlawfully did then and there do certain acts which then and there directly tended to render

one Mary Ternes (then and there a female child under the age of eighteen years, to-wit: of the age then and there of seven years,) a delinquent child," particularly describing the acts and conduct of defendant. Defendant endeavors to have the court treat the child, Mary Ternes, as the defendant in the case, and advances the novel theory that because of the age of the child it could not be guilty of a crime in Illinois, and therefore the accused could not be held to answer the charges named in the indictment. It will be noted that the indictment does not charge that the defendant rendered Mary Ternes "delinquent," but that he merely "tended" to do so. In People v. Gruhl, 388 Ill. 52, defendant was convicted in the Municipal Court of the crime of contributing to the delinquency of a child, and one of the contentions there made was that the information did not allege facts constituting the crime of which he was convicted, and that a child of three years of age could not become delinquent under any of the definitions enumerated in the statute. However, the court pointed out that one of the elements enumerated is indecent or lascivious conduct (Ill. Rev. Stat. 1943, ch. 38, par. 103), and that paragraph 104 of the same statute provides in substance that anyone who shall knowingly or wilfully do acts which shall tend to render such a child delinquent shall be guilty of the crime of contributing to the delinquency of the child, and held that "the acts alleged against plaintiff in error were such as would directly tend to render such child guilty of indecent and lascivious conduct. Since the crime was complete when the acts were committed it was not necessary for the information to allege, nor for the trial court to find, that the

child, who is the subject of the offense, should be or become, by reason of the acts committed, a delinquent child. People v. Klyczek, 307 Ill. 150." But defendant says that the Gruhl case is not in point because the court in its opinion held that the acts alleged against defendant in that case were such as to render the child guilty of indecent and lascivious conduct. We think the same may be said as to Mary Ternes in the case at bar.

The remaining point urged is that there was an implied acquittal of the defendant on the indecent liberties count of the indictment. It is urged that both counts having been submitted to the jury, and that having found defendant guilty of the second count, the jury thereby impliedly found him not guilty of the first count. The two authorities cited by defendant do not sustain his position. People v. Weil, 243 Ill. 208; People v. Smithka, 356 Ill. 624. The two offenses in the indictment are unrelated, separate and distinct crimes in themselves, and it may be that the evidence which is the same as to both counts may be insufficient for the one, although ample for the other.

The case was fairly tried, and finding no prejudicial errors in the record we are constrained to hold that the judgment of the Criminal Court should be affirmed, and it is so ordered.

JUDGMENT AFFIRMED.

Sullivan, P. J., and Scanlan, J., concur.

44305

RECONSTRUCTION FINANCE CORPORATION,
a corporation of the United States
of America, created by an Act of
Congress,

Appellant,

v.

ISADORE SHANEDLING,

Appellee.

APPEAL FROM SUPERIOR
COURT, COOK COUNTY.

335 I.A. 576

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

August 1, 1946 the plaintiff, Reconstruction Finance Corporation, brought an action at law against Felicia Shanedling and Isadore Shanedling to recover money found due under a deficiency decree entered in the Superior Court on January 25, 1937 in the foreclosure of a bond issue. The court in the present case entered judgment against Felicia Shanedling in the sum of \$2244.83, but found that by its order of August 11, 1936 the court retained no jurisdiction to enter a deficiency decree against Isadore Shanedling in the later order of January 25, 1937, that the entry of such decree as to him was a nullity, and accordingly dismissed him from the present proceeding, but without costs to either party. Plaintiff appeals, contending that judgment should also have been entered against Isadore Shanedling.

The foreclosure decree out of which this litigation arose was entered on December 9, 1935. Both Isadore and Felicia Shanedling had been personally served with summons, and defaulted. The decree found that if there were any deficiency remaining on sale, five certain defendants, Isadore Shanedling being one of them, were personally liable therefor. Thereafter sale was had in the foreclosure proceeding, and on August 11, 1936 a decree was entered confirming the report of sale and reserving jurisdiction "to enter a defi-

ciency decree and judgment against the defendants, Felicia Shanedling, Maurice J. Plonsker and Esther M. Plonsker, who are personally liable for the payment of said deficiency." Isadore Shanedling was not included in the reservation. The entry of the decree of August 11, 1936 was predicated upon the allegations of the plaintiff in the foreclosure action. The Reconstruction Finance Corporation, plaintiff in the present suit, became the assignee of the original plaintiff.

Subsequent to the filing of the foreclosure suit on August 17, 1931 Isadore Shanedling was defaulted on July 8, 1932 for want of appearance. Later, on May 1, 1934, he was adjudged a bankrupt, and was discharged in bankruptcy April 22, 1935. Notwithstanding the fact that in the order of August 11, 1936 there was no reservation of jurisdiction to enter any deficiency decree against him, such decree was nevertheless entered against him, Felicia Shanedling and three other defendants on January 25, 1937. This deficiency decree was entered without notice to or service of process upon Isadore Shanedling, and it was upon this decree that the claim of plaintiff in the present action is predicated. Subsequently, plaintiff herein brought this action at law to recover judgment against both of the Shanedlings, and a motion was made for summary judgment. At the conclusion of the hearing the court entered judgment against Felicia ~~Shanedling~~, as heretofore stated, but dismissed Isadore Shanedling from the proceeding.

The question presented is whether the decree of August 11, 1936, when properly construed, confirming the report of foreclosure sale, terminated the jurisdiction of

the court thereafter to enter any deficiency decree against the defendant Isadore Shanedling. The order entered by the court, from which this appeal is taken, provides that "no sums are recoverable by the plaintiff, from the defendant Isadore Shanedling, upon the claim asserted in the complaint of the plaintiff; the court considering that the order entered on August 11, 1936 in the proceedings entitled 'Central Republic Bank and Trust Company v. Isadore Shanedling et al.,' bearing general number 541699 of the Superior Court of Cook County, Illinois, and referred to in the record herein, served to retain no jurisdiction in said court to enter a deficiency decree, in said proceedings, on January 25, 1937, against said Isadore Shanedling, without notice to him, and the court further considering that such deficiency decree, so entered on January 25, 1937, to be a nullity as to said Isadore Shanedling."

We are in accord with that finding and judgment for the following reason. The decree of foreclosure entered on December 9, 1935 found that if, upon confirmation of the report of sale, any deficiency were shown in the amounts due complainant, he should be entitled to execution against Isadore Shanedling, Felicia Shanedling and three other defendants who were by such decree found to be "personally liable" for the payment of the sums due. The sale resulted in a deficiency, whereupon plaintiff applied for and procured the entry of an order finding only the defendants Felicia Shanedling, Maurice Plonsker and Esther M. Plonsker liable for the deficiency, and ordering jurisdiction reserved for the purpose of entering a deficiency decree against only

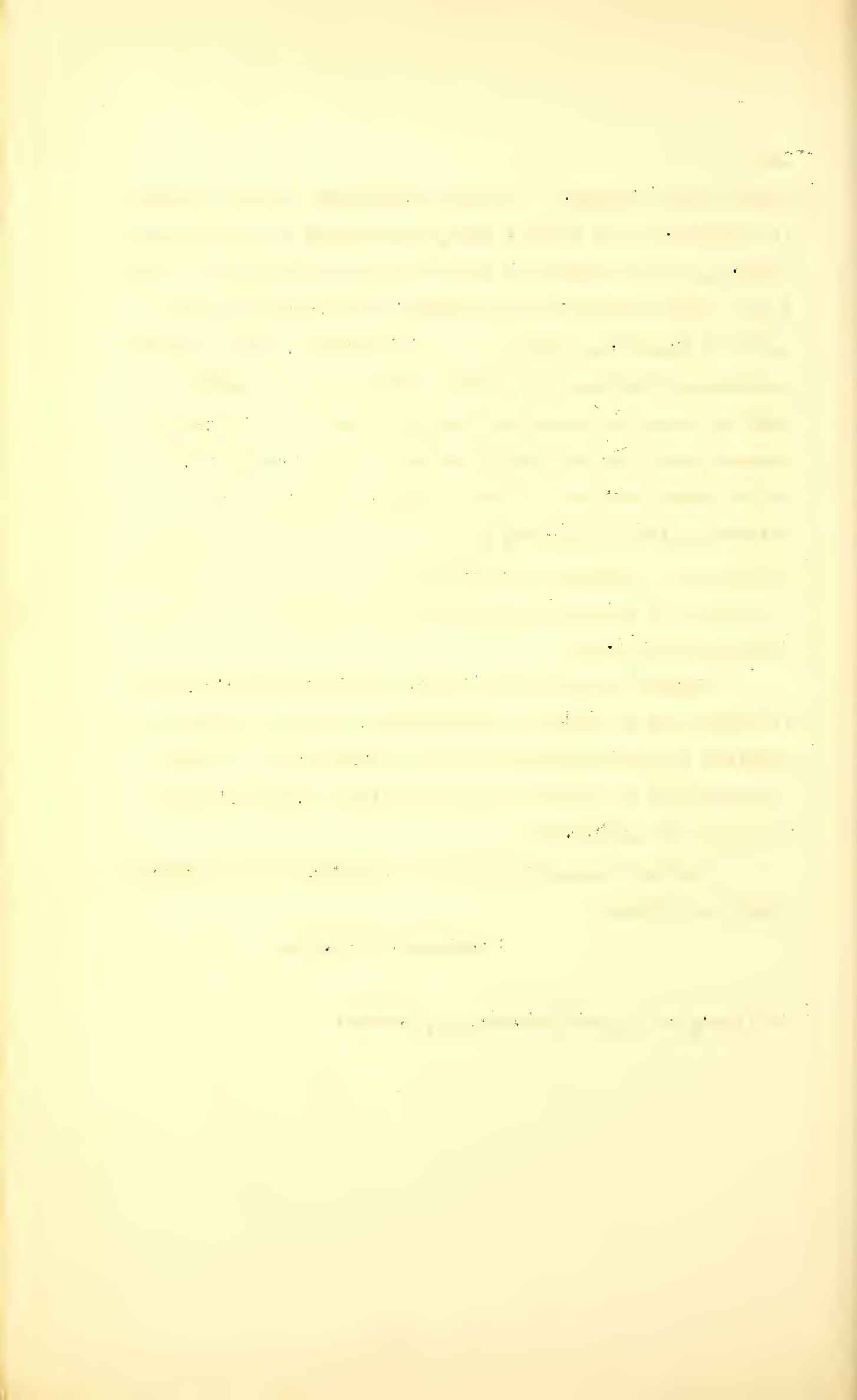
(these three defendants. Isadore Shanedling was not included in that order. Up to that time, even though he had been defaulted, he was obliged to follow the proceedings, but after being excluded from the reservation of jurisdiction by the order of August 11, 1936, he was at liberty to disregard the proceedings further. By virtue of the order of August 11, 1936 the court no longer had jurisdiction to enter judgment against him after the expiration of 30 days. Jurisdiction of the court must end at some definite time; any order entered against Shanedling after the court had lost jurisdiction was a nullity, and the invalidity of such deficiency as to him was properly considered by the court as a defense to the present suit. ✓

Neither of the parties cites any decisions precisely in point, but we think the fundamental rule as to the termination of jurisdiction after the expiration of 30 days, as prescribed by Illinois Revised Statutes 1945, ch. 110, sec. 174, is applicable.

For the reasons indicated the judgment of the Superior Court is affirmed.

Judgment affirmed.

Sullivan, P. J., and Scanlan, J., concur.



44486

IRVING H. BABBITT,
Appellee,

v.

S. C. ELBAUM,
Appellant.

)
) APPEAL FROM MUNICIPAL
) COURT OF CHICAGO.
)

3351.A.376

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

Plaintiff filed a forcible entry and detainer proceeding against defendant to obtain possession of a four-room apartment in the premises located at 7716 North Paulina avenue in Chicago. Trial of the cause by the court without a jury resulted in judgment for the plaintiff, from which defendant appeals.

Defendant had been a tenant of the first-floor apartment in question for several years before plaintiff acquired the property. The last written lease submitted to him, specifying a rental of \$52.50 per month, was for one year expiring on September 30, 1944. It included a garage stall, which defendant never used. Actually, he paid only \$47.50 per month. Shortly prior to that expiration date of September 30, 1944, defendant was tendered a new lease for one year. It is conceded by both parties that the proposed new lease also called for a rental of \$52.50 a month, including one garage stall, which was never used by defendant nor paid for by him. Under O.P.A. regulations the ceiling price for the premises was \$47.50. The new lease also carried a stamped notation to the effect that if in the future rent controls should be relaxed or abandoned, the rental would be increased over that stipulated in the lease. Defendant contended that these provisions were in violation of O.P.A. regulations, and therefore

refused the proffered lease. He continued to pay the monthly rental of \$47.50, which the landlord regularly accepted, until he (the tenant) received notice in writing on November 24, 1947 from the landlord that on and after December 1 of that year rent for the apartment would be payable to the plaintiff herein, who had become the owner of the property. On the same date plaintiff, the new landlord, served defendant with notice that tenancy of his apartment would terminate on December 30, 1947, and requested him to surrender up possession thereof on that date. The reason assigned for the termination of tenancy was that plaintiff desired the premises for his own use and occupancy.

As ground for reversal defendant urges that the aforementioned provisions of the new lease exceeded the maximum or ceiling rent as registered with the O.P.A., in contravention of O.P.A. regulations, and differed from the provisions of the former lease in that there was a stamped provision allowing for an increased rental if in the future it should be allowed by law; that he was therefore justified in refusing to sign the new lease; that his continued payment of rent thereafter in the amount of \$47.50 and the acceptance thereof by the landlord constituted a hold-over tenancy from year to year which could be terminated only on 60-day notice; and that consequently the 30-day notice which was served on him was insufficient. Plaintiff cites Keegan v. Kinnare, 123 Ill. 280, as authority for the proposition that whether a tenancy exists from year to year or month to month is to be ascertained from the landlord's intention, and he argues that it was his intention, upon

refusal of the tenant to sign the new lease, to create a month-to-month tenancy. There is nothing in the evidence or his conduct to warrant such a conclusion. Defendant was within his rights in refusing to sign the tendered lease which was not in conformance with O.P.A. regulations and provided for increased accommodations at a higher rental than he had been paying. It was likewise the landlord's right at that time to place the tenant upon a month-to-month basis, but in order to do so he would have been required to clearly express his intention either in words or by his conduct. If he had been duly served with a 60-day notice before the expiration of the year-to-year tenancy on September 30, 1947, that would have been the expression of such an intention. But this was not done; the tenant simply continued to pay rent in the same amount as theretofore, and the landlord accepted it until beyond the time when a 60-day termination of the year-to-year tenancy would have become effective. Under the circumstances we think that defendant's position is sound; he remained on a year-to-year basis, and such tenancy could be terminated only on a 60-day notice. The landlord failed to terminate the tenancy in the manner provided by statute in accordance with the provisions of section 5, chapter 80, Ill. Rev. Stat. 1947, and he is therefore not entitled to possession of the premises until he does so. The authorities in this state are generally in accord in so holding: Streit v. Fay, 230 Ill. 319; Fredman v. Sutliff & Case Co., Inc., 330 Ill. App. 119; Bell v. Groom, 224 Ill. App. 58; Barbee v. Evans,

220 Ill. App. 154; and Ransom v. Ransom, 115 Ill. App. 1.

For the reasons indicated the judgment of the Municipal Court is reversed.

Judgment reversed.

Sullivan, P. J., and Scanlan, J., concur.

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44496

1400 LAKE SHORE DRIVE CORPORATION,)
Appellant,) APPEAL FROM MUNICIPAL
v.) COURT OF CHICAGO.
SALLY McANINCH,)
Appellee.)

335 I.A. 377

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

The plaintiff, 1400 Lake Shore Drive Corporation, brought forcible detainer proceedings against Sally McAninch to obtain possession of her apartment for nonpayment of a portion of rent claimed to be due for the month of July 1947 under a written lease. Trial by the court without a jury resulted in judgment for defendant, from which plaintiff appeals.

No testimony was adduced upon the trial, the hearing consisting principally of the admission of documentary evidence without objection, and colloquy between court and the respective counsel. On and prior to July 1, 1947 defendant occupied apartment 11-A in plaintiff's building at a rental of \$127.00 per month. It was the practice of plaintiff to submit to its tenants at the close of each month a statement showing charges for telephone, telegraph and other miscellaneous items incurred during the previous month, and the rent due for the succeeding month. Thus at the close of June 1947 plaintiff submitted to defendant a statement showing such charges for June, and the rent due for July in the amount of \$127.00. Defendant paid this bill on July 2 and obtained a receipt therefor.

On July 1, 1947 the Housing and Rent Act of 1947 (50 U.S.C. App. secs. 1891 et seq.) became effective, superseding the Emergency Price Control Act of 1942. The new statute contained a provision (sec. 204 (b)) permitting

the landlord of controlled housing accommodations to effect a raise in rent up to 15 per cent if the tenant and the landlord entered into a voluntary lease for a term beginning after the effective date of the act and expiring on or after December 1, 1948, the lease to be executed on or prior to December 1, 1947.

Availing itself of the provisions of this act, plaintiff tendered defendant a new lease with the rental increased to \$146.00 per month, which provided for a term beginning July 2, 1947 and ending on December 31, 1948. This lease was dated July 28, 1947 and was executed, delivered and accepted by defendant on or about that date. In the following monthly statement submitted by plaintiff to defendant at the close of July 1947, there was shown an additional charge of \$18.37, representing the difference between the old rent and the rent stipulated in the new lease, plus the usual miscellaneous charges, and the rent of \$146.00 for August. Defendant appeared at the office of the building and offered her check in the amount of this bill, less the \$18.37 representing the balance claimed to be due on July rent. Her check was accepted at the office, but was subsequently returned to her because of the claimed discrepancy between the amount paid and the amount shown to be due, namely, \$18.37. Because of defendant's refusal to pay this small balance claimed to be due for July, plaintiff brought suit, seeking to terminate the lease and recover possession of the premises.

Defendant takes the position that since the lease was executed on July 28, 1947, the rent prescribed therein is not due for any prior period, even though the lease

itself prescribes that the effective date shall be due July 2, 1947. Plaintiff, on the other hand, argues that the parties are free to contract as they see fit in the absence of any statutory or other inhibition, and that the lease, even though retroactive in its operation, is nevertheless valid and binding on defendant. The controversy thus resolves itself, as we see it, into an interpretation of the statute. The provision of the Housing and Rent Act of 1947 giving landlords the right to a 15 per cent increase, provides in effect that it shall be the result of a voluntary arrangement between the landlord and the tenant. Accordingly, if the landlord elects not to give a lease, then he may continue to collect the rent in effect prior to the effective date of the Housing and Rent Act of 1947 until the termination of the existing lease or until the termination of the particular Federal Rent Control Act then applicable to the particular housing accommodations; and, on the other hand, if the landlord offers to the tenant a lease up to December 31, 1948 which provides for a 15 per cent increase, the tenant is not bound by the act to accept the same and his rights are not in anywise jeopardized or affected by his refusal.

It therefore follows that the 15 per cent increase can only happen as the result of the mutual understanding of the landlord and tenant. In the case before us, the landlord did not indicate it elected to avail itself of the provisions of the new act until the month of July had almost expired, and it seems to us a reasonable construction to hold that when the lease was delivered to defendant on July 28 that the new rent would become effective, upon her acceptance, for the month of August 1947. Her understanding of that

arrangement is indicated by the fact that she paid the increased rental for the month of August and for subsequent months, and in view of the fact that plaintiff had accepted defendant's check for the lesser rental and gave her a receipt therefor, it would be a harsh application of the statute to hold that she had retroactively agreed to pay the additional rent for the current month of July, all of which, except three days thereof, had expired when the lease was tendered and accepted. The courts have emphasized the necessity of the mutual assent or meeting of the minds of the parties as a condition precedent to the existence of a binding lease. National Union Building Association v. Knab, 177 Ill. App. 649.

Plaintiff contends that there is no limitation in Illinois law upon the right of the parties to make a lease agreement effective retroactively. This is a sound proposition, but it affords no aid to plaintiff in that there was no agreement of the parties. Defendant's action in proffering her check July 2 in an amount to take care of \$127.00 rental, and her subsequent checks in amounts to cover the increased rental of \$146.00, leaves no doubt that she considered the new lease as becoming effective August 1, 1947; and plaintiff's acceptance of defendant's checks from September 1947 through January 1948 would seem to suggest that plaintiff was willing to be bound by defendant's construction of the lease.

Plaintiff's suit is in effect an attempt to declare a forfeiture for the alleged nonpayment of \$18.37. Under ordinary circumstances it is extremely doubtful whether a landlord would bring suit for such an inconsequential

amount, and prosecute an appeal from an adverse judgment. The real reason for instituting the proceeding is found in defendant's statement to the court, as follows: "Mr. Claar [plaintiff's manager] told me that he did not want the rent; he wanted to evict me so that he could sell the apartment. He would pay me money to move out and that he would not sue me. He said he would not bother me." Defendant's brief states that plaintiff had accepted six months' rent subsequent to the alleged forfeiture. Plaintiff denies this statement, but apparently defendant paid rental for September, October, November, December, 1947, and January 1948, prior to the institution of this suit. The rent for the months of February and March, 1948, was tendered by defendant but refused by plaintiff because of the pendency of this proceeding.

The court found for defendant, and in the absence of a complete report of proceedings we must presume that the evidence presented at the trial was ample to sustain the finding of the court. Louis E. Bower, Inc. v. Silverstein, 298 Ill. App. 145; Kilpatrick v. Schmitt, 303 Ill. App. 15; Mamann v. Becklenberg, 310 Ill. App. 385.

For the reasons indicated, the judgment of the Municipal Court is affirmed.

Judgment affirmed.

Sullivan, P. J., and Scanlan, J., concur.

44585

HARRY EAGER,

Appellee,

v.

GLENS FALLS INDEMNITY
COMPANY, a corporation;
and FROLICS, INC., a
corporation,

(Certain Defendants),
Appellants,

THE SOUTHEAST NATIONAL BANK
OF CHICAGO, a national bank-
ing corporation; and HENRY
SONNENSCHNEIN, as Clerk of the
Superior Court of Cook County,
Certain Defendants.

INTERLOCUTORY APPEAL
FROM SUPERIOR COURT,
COOK COUNTY.

335 I.A. 578

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

This is an interlocutory appeal from an injunction issued by the Superior Court without notice.

The facts of the principal litigation out of which this controversy arose are reported in Frolics, Inc. v. Republic Warehouse Corp. (Abst.), 333 Ill. App. 647, and need not be repeated here. Frolics, Inc. has been dissolved and is no longer doing business. Its only asset is a bank account in the Southeast National Bank, against which a certified check for \$55,000 was drawn, and this suit in equity was brought by plaintiff Harry Eager seeking to impose a lien thereon for \$8195.19, and to have an injunction issued restraining defendant Glens Falls Indemnity Company from taking any steps to enforce an assignment of said check, and for general relief.

The complaint herein was filed on June 16, 1948, and a temporary injunction was issued without notice on the same day, restraining Glens Falls Indemnity Company, Frolics, Inc. and the Southeast National Bank of Chicago from taking any

further steps to enforce the aforementioned assignment which was made on December 13, 1946 between Frolics, Inc. and the Glens Falls Indemnity Company, and also restraining Henry Sonnenschein as clerk of the Superior Court from delivering the check which had been deposited with the clerk by order of the court, to any person whatever until the further order of court. The writ of injunction was issued and served on Glens Falls Indemnity Company on the following day, June 17, 1948.

Thereafter, Glens Falls Indemnity Company and Frolics, Inc. filed their motions to dissolve the injunction, and on July 1, 1948 an order was entered by the chancellor denying their motions, from which both of these defendants have taken an interlocutory appeal.

Although this suit was obviously brought to prevent a further assignment of the \$55,000.00 check and to hold the fund intact so that a lien could be imposed upon the check for the amount of the \$8195.19 judgment against Frolics, Inc. which had been entered in the Municipal Court on February 14, 1946, the complaint does not allege that the rights of the plaintiff will be prejudiced if an injunction is not issued immediately or without notice, and the prayer for relief does not request the issuance of an injunction without notice; likewise, the order entered by the chancellor is absolutely silent as to any reason for issuing an injunction without notice. On this state of the record the appealing defendants contend, as the sole ground for reversal, that the temporary injunction was improvidently issued and should have been dissolved on their motion because no notice was

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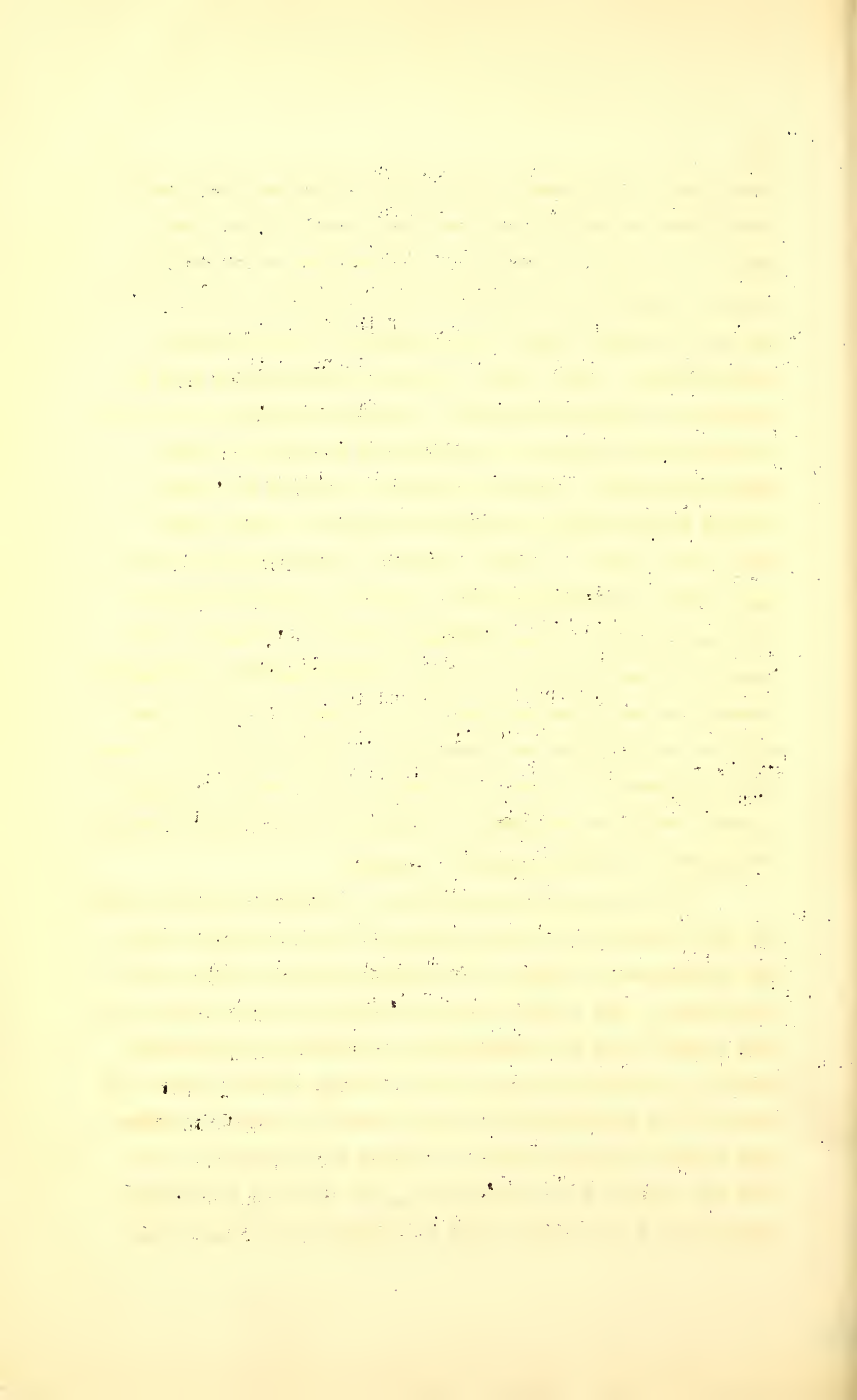
given and no facts were alleged in the complaint which would justify the granting of an injunction ex parte and without notice. Section 3, paragraph 3, chapter 69, Ill. Rev. Stat. 1947, is mandatory and explicit in its provision that "No court or judge shall grant an injunction without previous notice of the time and place of the application having been given to the defendants to be affected thereby, or such of them as can conveniently be served, unless it appears, from the complaint or affidavit accompanying the same, that the rights of the plaintiff will be unduly prejudiced if the injunction is not issued immediately or without notice." Defendants moved to dissolve the injunction under the provisions of the Practice Act/^{(Ill.} Rev. Stat. 1947, ch. 110, par. 202, sec. 78), but they expressly predicated their motion on the ground "that it does not appear from the allegations of the complaint or the affidavit supporting the same that the rights of the plaintiff would have been unduly prejudiced if notice had been given of the application for the said temporary injunction, and that no immediate injunction was necessary without notice in order to save the plaintiff from harm." The law is well settled in this state that the foregoing statute is to be strictly construed, and that the extraordinary remedy of injunction without notice should not be allowed except upon a sufficient showing. In the early case of Koelling v. Foster, 150 Ill. App. 130, the court held that "where an injunction is improvidently granted, without notice, in a case where notice should have been given, aside from any other question raised by the bill, this court will reverse such injunctional order." More recently, in Balaban & Katz Corp.

v. Rose, 283 Ill. App. 615, the court in holding that an injunction was improvidently issued, quoted from Brin v. Craig, 135 Ill. App. 301, as follows: "'This court has spoken many times in no uncertain voice in condemnation of the practice of granting an injunction without notice unless it is made clearly and indisputably to appear from the facts recited and verified, that the rights of a complainant will be unduly prejudiced unless the same be granted without notice. No presumptions are to be indulged in favor of action without notice, but parties must, on facts stated and sworn to, bring themselves within the exception of the statute before being entitled to an injunction without notice. Failing to do so, an injunction granted will be held to be improvident and dissolved.'" The courts have consistently followed and approved these opinions. Kessie v. Talcott, 305 Ill. App. 627; and Wagner v. Okner, 306 Ill. App. 601.

The contention most strongly urged by plaintiff in support of the injunctional order is that the complaint presented a factual situation which would justify an injunction without notice. We have carefully read the complaint. Aside from a recital of the circumstances leading up to the judgment from which the original appeal was taken (Frolics, Inc. v. Republic Warehouse Corp., 333 Ill. App. 647), which are fully set forth in our former opinion, it merely alleges that the "pretended assignment [to Glens Falls Indemnity Company] was fraudulent and collusive, and was made with the purpose and intent of hindering and defrauding the creditors of Frolics, Inc., including the plaintiff"; that Frolics, Inc. is insolvent and has been dissolved; that the certified

check (now in the hands of the clerk of the Superior Court) constitutes its only asset; and that since Frolics, Inc. is unable to respond in damages to any judgment which might be rendered against it, plaintiff has no adequate remedy at law. The only reason now urged for issuance of the injunction without notice in the light of these allegations is that if notified, defendants might have assigned the \$55,000.00 check to someone else before a hearing could be had, and thus thwart plaintiff's efforts to impose a lien on the check. It will be noted that plaintiff's claim to a lien on the check was a matter of public record in the replevin proceedings before Judge Haas, and the check was in possession of the clerk subject to the further order of the court. Moreover, it is not alleged or claimed that Glens Falls Indemnity Company was insolvent and unable to respond in damages, nor would we be justified ~~in assuming from~~ the allegations of the complaint that, if served with notice, Glens Falls Indemnity Company would make or permit a further and necessarily hurried assignment to defeat plaintiff's rights.

It is suggested in plaintiff's argument that in moving for the dissolution of the injunction, the defendants waived the requirement of notice by touching upon the merits of the controversy. The record clearly discloses, however, that the only point before the chancellor was whether the injunction should be dissolved because it was granted without notice. It appears that the chancellor asked certain questions touching upon various aspects of the case which had something to do with the merits of the controversy, but all that defendants' counsel did was to state their position; they did not, how-



ever, depart from the ground upon which their motion to dissolve was predicated. There was no other issue before the court.

Nor is there any merit to the contention that the trial judge properly exercised a discretion in the matter. The statutory provision is clear that no injunction shall be issued without notice unless it appears from the complaint or affidavit that the rights of the plaintiff will be unduly prejudiced if notice is given. No such showing is made in the complaint, and no supplemental affidavits were filed.

For the reasons indicated we are constrained to hold that the injunction was improvidently issued, and that the order of the chancellor denying the motions to dissolve should therefore be reversed. It is so ordered.

ORDER REVERSED.

Sullivan, P. J., and Scanlan, J., concur.

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STATE OF ILLINOIS

APPELLATE COURT

THIRD DISTRICT

October Term, A. D. 1948

General No. 9610

Agenda No. 10

WALTER BURKE,
Plaintiff-Appellee,
vs.
LINA MARTIN,
Defendant-Appellant.

LINA MARTIN,
Counter Claimant-Appellant,
vs.
WALTER BURKE,
Counter Defendant-Appellee.)

Appeal from
County Court of
Platt County.

335 I.A. 542

Wheat, J.

Plaintiff-appellee, Walter Burke, obtained a jury verdict in the sum of \$300 for farm services against defendant-appellant, Lina Martin. From an order denying alternative motions for judgment notwithstanding the verdict, in arrest of judgment, and for new trial, this appeal follows. The case reached the County Court as a result of an appeal from a jury verdict and judgment for plaintiff in a Justice of the Peace court.

The agreement between the parties was based upon the following memorandum, dated January 31, 1946:

"Mrs. Martin agrees to pay farm labor to Walter Burke as follows:

- (1) Wages at one hundred ten dollars per month.
- (2) One hundred dollars bonus at end of year.
- (3) Corn husking by the bushel at two cents above picker price - to get picker to finish before weather breaks up.
- (4) to feed fifty hens
- (5) to raise one hundred baby chickens
- (6) four meat hogs weighing two hundred fifty lbs. each
- (7) is to have half off six cows
- (8) Burke is to buy eight pigs to be fed out to market weight.
- (9) Mrs. Martin promises electricity as soon as possible.
- (10) No other foreman but Mrs. Martin

The above agreement to hold from 2-1-46 to 3-1-47

Walter Burke"

Subsequently the parties agreed to an extension of the above for another year, with the wages fixed at One hundred fifteen dollars per month, and with the further change (as plaintiff contends) that the bonus was to be increased to Two hundred dollars.

Burke performed his obligations under the contract until June 27, 1947, at which time he underwent surgery. His wages were paid to July 1, 1947. During his absence from the farm, his wife and children continued to live on the farm taking care of Mrs. Martin's livestock. During this time, Burke's hogs and poultry were fed with a commercial feed furnished by Mrs. Martin. During July, Mrs. Martin hired various men by the day and hour to cultivate the corn and soy beans, paying out a total of Two hundred sixty-three dollars. Upon his discharge from the hospital, plaintiff returned to the farm about July 15 and apparently resumed his farm work on August 1, taking care of his own and Mrs. Martin's

The agreement between the parties was based upon the

following understanding, dated January 21, 1943:

That Martin agrees to pay back labor to Walter
Smith as follows:

- (1) To pay back two dollars per month.
- (2) To pay back one dollar per month as of June.
- (3) To pay back one dollar per month as of July.
- (4) To pay back one dollar per month as of August.
- (5) To pay back one dollar per month as of September.
- (6) To pay back one dollar per month as of October.
- (7) To pay back one dollar per month as of November.
- (8) To pay back one dollar per month as of December.
- (9) To pay back one dollar per month as of January.
- (10) To pay back one dollar per month as of February.
- (11) To pay back one dollar per month as of March.
- (12) To pay back one dollar per month as of April.
- (13) To pay back one dollar per month as of May.
- (14) To pay back one dollar per month as of June.
- (15) To pay back one dollar per month as of July.
- (16) To pay back one dollar per month as of August.
- (17) To pay back one dollar per month as of September.
- (18) To pay back one dollar per month as of October.
- (19) To pay back one dollar per month as of November.
- (20) To pay back one dollar per month as of December.

The above agreement to hold from 1-1-43 to 1-1-44

ended when

Subsequently the parties agreed to an extension of the above
for another year, with the same terms as the original
agreement per month, and with the further change (as indicated
contained) that the money was to be increased to two dollars
dollars.

After the above his obligations under the contract ended
June 27, 1943, at which time he underwent surgery. His wages
were paid to July 1, 1943. During his absence from the farm,
his wife and children continued to live on the farm taking
care of the Martin's livestock. During this time, Martin's
hopes and desires were for a comfortable and peaceful life
by Mrs. Martin. During this time, Martin hired various men
by the day and hour to cultivate the corn and soy beans,
paying out a total of two hundred fifty-three dollars.
Upon his discharge from the hospital, Martin returned
to the farm about July 15 and apparently resumed his farm
work on August 1, taking care of his own and Mrs. Martin's

stock, mowing weeds, fixing fences, and hauling feed and livestock. A disagreement occurred on August 20, the employment terminated, and, according to plaintiff, Mrs. Martin stated, "You're fired. Get off my place."

Plaintiff received no wages after June 30 and started suit to collect for nineteen days wages in August at the contract rate, being \$70, for one-half of the two hundred dollars bonus he alleges was agreed upon, and for one-half the value of 1000 pounds of hogs, being \$130, the latter apparently being claimed under item 6 of the contract, making a total claim of \$300. Defendant filed her counterclaim for the following items:

- (1) the value of milk from three cows, sold by plaintiff or his family - \$132.50
- (2) the value of eggs produced by plaintiff's chickens - \$53
- (3) the value of feed furnished by defendant to plaintiff for his hogs and chickens - \$265
- (4) the above for the period of June 27 through August 19
- (5) \$263 representing money paid for cultivation of corn and beans during July, making a total of \$713.50.

The jury disallowed the counterclaim of Mrs. Martin, bringing in a verdict of \$300 for plaintiff. Upon motion, Fifty dollars was taxed as costs for plaintiff's attorneys fees by reason of a prior wage demand.

The important issue on appeal is as to whether or not the verdict is against the manifest weight of the evidence as to damages.

Defendant contracted for the personal services of plaintiff. During his illness she might have elected to terminate the contract or to continue it in force. The jury was justified in finding that she did not so elect to terminate the contract until August 20, 1947, and then did so without sufficient cause, having theretofore waived

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the illness as possible cause. Plaintiff then had the right to recover on a quantum meruit basis, the compensation being prima facie the rate provided in the contract. (Gunn v. Minnesota Mut. Life Ins. Co., 322 Ill. App. 313; Bowden v. Board of Education, 264 Ill. App. 1; 56 C.J.S. 555; Williston on Contracts, Sec. 1977). Plaintiff was entitled to recover the sum of \$70 for nineteen days work in August at the rate of \$115 per month. As to the bonus, the jury was justified in finding that plaintiff was entitled to receive a proportionate part of this in the nature of additional wages or compensation. (56 C.J.S. 530) However, such proportionate part amounts to \$77 instead of \$100, which is presumably the figure used by the jury. Likewise, the jury was justified in awarding plaintiff a sum measured by the value of 1000 pounds of hogs, which value accrued to him during the approximately twenty weeks of work out of the year. On the evidence this would amount to \$100, resulting in a maximum total, under the evidence, of \$247. As to the counterclaim, our view is that defendant was entitled to recoup from plaintiff for the value of milk and cream sold by the Burke family during the period of slightly less than five weeks, during which plaintiff did not work. The failure of the jury to find that defendant was also entitled to the value of feed consumed by the chickens and stock of plaintiff, during his illness, was also against the manifest weight of the evidence.

As to defendant's claim for \$263 wages paid to others, the rule in these circumstances is that illness excuses the performance of an employee's contract. If, as we believe, defendant could not have recovered had plaintiff failed to return to work, it is difficult to see how her position could be any better because the latter did so return.

the illness as possible cause. Plaintiff then had the right to recover on a quantum meruit basis, but compensation being prima facie the rate provided in the contract. Quinn v. Minneapolis City, 115 Minn. 401, 135 N.W. 2d 1001, 135 N.W. 2d 1001.

Board of Education, 101 Minn. 401, 135 N.W. 2d 1001. Plaintiff on June 2nd, Dec. 1917. Plaintiff was entitled to recover the sum of \$20 for nineteen days work in August of the year of 1918 per month. As to the bonus, the jury was instructed in finding that plaintiff was entitled to receive a bonus of \$1000 in the nature of additional wages or compensation. 100 N.W. 2d 1001. However, such compensation was not payable to 1917 instead of 1918, which is immaterial for the purpose of the jury. Likewise, the jury was instructed in finding plaintiff was entitled to the value of 1918 bonus of \$1000, which value was added to his bonus for the year of 1917. The jury was instructed that plaintiff was entitled to \$1000, resulting in a maximum bonus of \$2000. As to the compensation, the jury was instructed that defendant was entitled to recover from plaintiff for the value of 1918 and bonus paid by the bonus for 1917. The period of plaintiff's loss was five weeks, during which plaintiff did not work. The failure of the jury to find that defendant was also entitled to the value of 1918 bonus consumed by the defendant and a bonus of plaintiff, during his illness, was also against the manifest weight of the evidence.

As to defendant's claim for 1918 bonus paid to others, the rule in these circumstances is that illness excuses the performance of an employee's contract. It is well settled that defendant could not have recovered his plaintiff's claim to return to work, it is difficult to see how his position could be any better because the latter did so return.

The claim of plaintiff for attorney's fees should not have been allowed, as he failed to establish that the entire amount claimed by him was justly due and owing. (Fletcher v. Massey, 49 Ill. App. 36; Moore v. Terhune, 161 Ill. App. 155).

By reason of the foregoing, from which the conclusion is obvious that the verdict was against the manifest weight of the evidence, the motion for new trial should have been allowed, and the court erred in failing to allow the same.

The cause is reversed and remanded for a new trial.

Reversed and remanded.

The court also found that the defendant's behavior was
not unusual, as he failed to provide any evidence.
The court also found that the defendant's behavior was
not unusual, as he failed to provide any evidence.

44201

JULIA RAUSCHER and JOHN E.
RAUSCHER,

Appellees,

V.

BOULEVARD MANOR DEFENSE HOMES,
INC., a corporation,

2011,
Appellat. t.

Appeal from the County
Court of Cook County.

3 35 I.A. 643¹

MR. PRESIDING JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT.

Plaintiffs, Julia Rauscher and John E. Rauscher, filed a suit before a justice of the peace against the defendant, Boulevard Manor Defense Homes, Inc., to recover from the latter alleged overpayments of interest made by plaintiffs to defendant at the time of the settlement by the parties of the purchase price of a house and lot sold by defendant to plaintiffs. Defendant appealed to the County Court of Cook County from a judgment entered against it by the justice of the peace. In the County court a verdict was returned finding the issues in favor of plaintiffs and assessing their damages at \$171.67. Upon a remittitur of \$60, judgment for \$111.67 was entered against defendant and it appeals from said judgment. Plaintiffs have filed no brief in this court.

There is no serious dispute as to the salient facts. On September 5, 1945 the parties entered into a written contract under the terms of which defendant agreed to sell plaintiffs a house and lot, the house to be thereafter constructed on the lot which was then vacant. The total consideration to be paid by plaintiffs was \$8600, payable \$1200 in cash and \$5400 in monthly installments upon a

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mortgage executed by defendant and held by the Bell Savings and Loan Association. Plaintiffs made the cash payment of \$1200. The first monthly payment of \$30.02 upon the mortgage, which included principal and interest, was due on November 1, 1945. This payment was made by defendant, as were seven succeeding monthly payments, while the house was under construction and before the completion of the sale. These eight monthly payments made by defendant upon the mortgage were credited in part upon the principal thereof and the remainder of such payments, amounting to \$171.67, was credited against the interest due thereon. Plaintiffs reimbursed defendant for the eight monthly installments paid by it on the mortgage.

The interest payments in question were made by defendant for the period from November 1, 1945 to June 1, 1946. Plaintiffs did not receive possession of the house until July 19, 1946 and their position in the trial court, as shown by the record, was that they should not have been charged by the defendant **with interest upon the mortgage** prior to the time they took possession and that they had a right to recover such interest.

Plaintiffs admittedly ordered certain extra work done on the house by the independent contractor who was constructing same. Defendant claimed upon the trial that the construction of the house was delayed several months because of said extra work and that in any event interest, which accrued because of such delay, was properly chargeable against plaintiffs. The latter acquiesced in the remittitur of \$60 ordered by the County court on account of this delay and the amount of the verdict was reduced to that extent, as heretofore shown.

3.

Numerous grounds are urged for reversal but the only question we deem it necessary to determine is that presented by defendant's contention that "a voluntary payment, made under a claim of right, with knowledge of the facts, but in ignorance of legal rights, cannot be recovered provided there is no fraud or duress shown."

If it be assumed that the construction of the house was delayed from November 1, 1945 to June 1, 1946 solely through the fault of the defendant, plaintiffs then, as a matter of law, should not have been charged with the interest in question. However, prior to the settlement of the purchase price plaintiffs received a written statement from defendant plainly showing that the amounts claimed by the latter from the former included the eight monthly payments of \$30.02 for principal and interest on the mortgage loan.

There is no evidence in the record that plaintiffs did not know what they were paying or that they did not have complete knowledge of the facts when they reimbursed defendant for the monthly mortgage payments it had advanced. The record discloses that plaintiffs' sole contention upon the trial, according to their attorney, was that "this \$171.67 is an overpayment of interest that we did not have to pay." Their position on the trial was simply that they had paid to defendant the interest in question which they were under no legal obligation to pay. There was not even an intimation that such interest was paid to defendant through a mistake of fact or as a result of fraud or duress.

It has been repeatedly held in this state that where a payment is made with knowledge of the facts and in ignorance only of legal rights, it cannot be recovered and proof that the one making the payment was under no legal

4.

obligation to pay is of no consequence unless the payment was compulsory. (See City of Chicago v. Stuart, 53 Ill. 83; Union Building Ass'n v. City of Chicago, 61 Ill. 439; People v. Foster, 133 Ill. 496; Illinois Glass Co. v. Chicago Telephone Co., 234 Ill. 535; Illinois Merchants Trust Co. v. Harvey, 335 Ill. 284; Stoltze v. Stoltze, 393 Ill. 433; Bryan v. Pilgrim National Life Ins. Co., 294 Ill. App. 356; Sando v. Smith, 237 Ill. App. 570; Western & Southern Life Ins. Co. v. Brueggeman, 323 Ill. App. 173.)

In Illinois Glass Co. v. Chicago Telephone Co., 234 Ill. 535, it appeared that the defendant had installed telephone service under a city ordinance providing that it could construct, maintain, and operate its lines for twenty years if it did not increase its rates over those which it was required, by the ordinance, to schedule. The plaintiff had subscribed for a business telephone at the scheduled rate of \$125 a year. Later, to eliminate noise, a metallic circuit was installed in place of a grounded circuit, and defendant increased its charge to plaintiff \$50 a year. Plaintiff, after paying an overcharge of \$209.97, sued to recover. The court, in affirming a judgment based upon a directed verdict for defendant, stated at p. 541:

"It has been a universally recognized rule that money voluntarily paid under a claim of right to the payment and with knowledge of the facts by the person making the payment cannot be recovered back on the ground that the claim was illegal. It has been deemed necessary not only to show that the claim asserted was unlawful, but also that the payment was not voluntary; that there was some necessity which amounted to compulsion, and payment was made under the influence of such compulsion."

In the recent case of Western & Southern Life Ins. Co. v. Brueggeman, 323 Ill. App. 173, the court affirmed a judgment of the trial court holding that the plaintiff

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insurance company could not recover an overpayment of insurance where the limited liability of a military clause in the policy was overlooked by the plaintiff. There the court said at p. 178:

"The general rule seems to be that a payment made, with full knowledge of the facts and circumstances and in ignorance only of legal rights, cannot be recovered back, and proof that the one making the payment was, in fact, under no legal obligation to pay, and the other had no right to receive the payment, is of no consequence and will not entitle the one making the payment to sue for a recovery of the money, unless the payment was compulsory to the extent of depriving him of the exercise of his free will."

→ The payments of interest involved herein made by plaintiffs to defendant were unquestionably voluntary. There was evidence presented by plaintiffs that they made such payments because defendant refused to deliver a deed to the land purchased by them unless they did so. There was no immediate necessity of obtaining a deed since plaintiffs were in possession of their house before said interest was paid by them. They did not need a deed immediately in order to transfer title or to complete a sale of the property. They could have and, if they thought they were being overcharged, should have, refused to pay what they now claim was not legally due. Their obvious remedy was to file a suit in equity for specific performance rather than to pay what they considered was not legally due and then sue for its return. In Illinois Merchants Trust Co. v. Harvey, 335 Ill. 284, the trial court found that the defendant, a lessor, had served the plaintiff, his lessee, with a notice of forfeiture of the lease unless the plaintiff paid certain income taxes of the defendant. Under defendant's construction of the lease, the plaintiff was liable for the taxes in question. Plaintiff made the payments, amounting to

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\$9900.97, in order to avoid the forfeiture, and then filed suit to recover the amount paid. It was conceded by the defendant upon the trial of that case that the plaintiff was not liable for the amount paid and that its construction of the lease was erroneous. A verdict was directed for the defendant and judgment entered thereon. In affirming said judgment and holding that the money could not be recovered, the court said at pp. 291, 292, 296:

"From the Illinois cases cited, and those of other jurisdictions, the rule is deducible that where one, to prevent injury to his person, business, or property, is compelled to make payment of money which the party demanding has no right to receive and no adequate opportunity is afforded the payor to effectively resist such payment, it is made under duress and can be recovered * * *.

"* * * If he may avoid the payment of such demand by resorting to a remedy in equity but does not avail himself of such remedy the payment is not compulsory even though pressure for payment is re-enforced by a threat to commit injury.

"We are of the opinion that the forfeiture threatened against defendants in error (lessee) was cognizable in equity and that, the demand being invalid and the result of a forfeiture being of serious consequence to defendants in error, equity would have relieved against the same * * * There was adequate time to secure the aid of equity and that court was open to them. It follows that the payment by them was voluntary and not made under compulsion or duress."

The law as enunciated in the Harvey case is peculiarly applicable to the situation presented here.

Plaintiffs may well have avoided paying the interest demanded of them by defendant by refusing to pay and then filing a suit for specific performance to compel defendant to deliver a deed to the premises. There was adequate time for the plaintiffs in the instant case to secure the aid of equity but they failed to do so. The payment made by them was voluntary and was not made under fraud or duress.

Since plaintiffs failed to prove the essential elements necessary to make out a prima facie case for recovery on a claim such as that involved herein, the judgment of the County court of Cook county must be reversed and the cause remanded with directions to sustain defendant's motion for a judgment in its favor notwithstanding the verdict and to enter judgment notwithstanding the verdict in favor of defendant and against plaintiffs.

REVERSED AND REMANDED WITH DIRECTIONS.

Friend, J., and Scanlan, J., concurs.

44202

JOHN A. MASLASKY and LILLIAN H.
MASLASKY,

Appellees,

v.

BOULEVARD MANOR DEFENSE HOMES, Inc.,
a corporation,

Appellant.

Appeal from the
County Court of
Cook County.

335 I.A. 643²

MR. PRESIDING JUSTICE SULLIVAN DELIVERED THE OPINION OF THE
COURT.

Plaintiffs, John A. Maslasky and Lillian H. Maslasky, filed a suit before a justice of the peace against the defendant, Boulevard Manor Defense Homes, Inc., to recover from the latter alleged overpayments of interest made by plaintiffs to defendant at the time of the settlement by the parties of the purchase price of a house and lot sold by defendant to plaintiffs. Defendant appealed to the County court of Cook county from a judgment entered against it by the justice of the peace. In the County court a verdict was returned finding the issues in favor of plaintiffs and assessing their damages at \$171.67. Upon a remittitur of \$60, judgment for \$111.67 was entered against defendant and it appeals from said judgment.

The appeal in this case was consolidated for hearing in this court with the appeal perfected in case No. 44201. The opinion in case No. 44201 is filed concurrently with this opinion. While the plaintiffs are different in the two cases, both suits were brought against the same corporate defendant and sought the same relief against it. The facts in this case are practically identical with the facts in case No. 44201. The verdict and judgment in that case against the defendant

2.

were the same as in this case and the same questions are presented for review. Our decision in that case is controlling as to the questions presented here and for the reasons stated therein, the judgment entered by the County court of Cook county against the defendant in this case must be reversed and the cause remanded with directions to sustain defendant's motion for a judgment in its favor notwithstanding the verdict and to enter judgment notwithstanding the verdict in favor of defendant and against plaintiffs.

REVERSED AND REMANDED WITH
DIRECTIONS.

Friend, J., and Scanlan, J., concur.

44444

DAVID SWANSON,
Appellee,

v.

JANE SWANSON,
Appellant.

APPEAL FROM SUPERIOR COURT,
COOK COUNTY.

335 I.A. 644

MR. PRESIDING JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT.

Plaintiff, David Swanson, filed a complaint for divorce against his wife, Jane Swanson, charging her with adultery and extreme and repeated cruelty. The defendant, Jane Swanson, filed a cross complaint for separate maintenance, which she later withdrew. On November 29, 1946 a decree of divorce was entered in favor of plaintiff on the ground that his wife was guilty of extreme and repeated cruelty. There were three children born of the marriage, who were 7 years old, 6 years old and 22 months old respectively at the time the decree of divorce was entered. The decree reserved the question of the custody of the children for future consideration and referred that question to a master in chancery for hearing. The decree also provided that "the entry of this divorce decree on the ground of extreme and repeated cruelty shall be without prejudice to the right of either party to introduce any and all evidence that may be material or pertinent on the question of the custody of the minor children and the fitness and propriety of the respective parties and their homes and environment."

There were extensive hearings before the master and he found, inter alia, in his report that "the defendant has forfeited her natural rights to care for, raise and educate said children" and concluded that "the care, custody and education of the three minor children should be awarded to the father, David Swanson, with liberal rights of visitation and reasonable vacation periods to the mother, Jane Swanson." On January 13, 1948 the chancellor entered a supplemental decree which approved in all respects the

report of the master and adjudged that "the care, custody, and education of the three minor children, Barbara, Sandra and David be and hereby is awarded to the plaintiff David Swanson." The defendant appeals from the supplemental decree.

Defendant's sole contention is that "the verdict [decree] is against the manifest weight of the evidence." In respect to this contention plaintiff asserts that "a reviewing court cannot pass upon an assignment of error that the decree is contrary to the manifest weight of the evidence where the record does not contain all the evidence and the abstract of the evidence included in the record is incorrect, inadequate and insufficient."

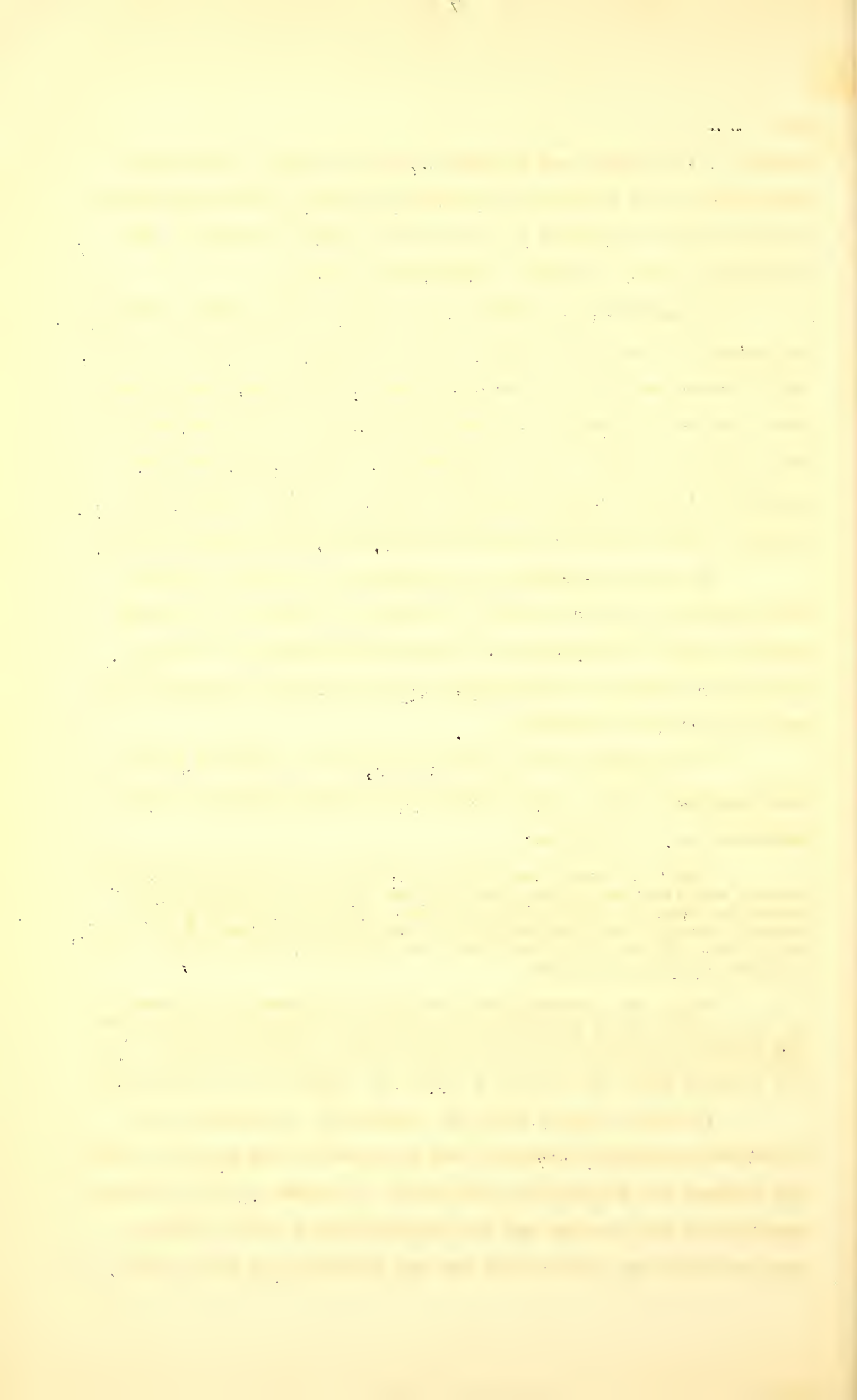
The record contains the testimony of all the witnesses who appeared before the master but there is omitted therefrom, inadvertently or otherwise, 17 letters presented in evidence before him which were admittedly received by the defendant from men other than her husband.

The findings of the master, which were approved by the supplemental decree, on the issues of fact presented for determination were as follows:

"That defendant has carried out her necessary household duties satisfactorily and when at home with the children has cared for them in a motherly fashion. She has, however, absented herself very frequently for entire evenings on dates with other men, during which intervals the children were, in a measure, neglected by her.

"That the correspondence of the defendant as evidenced by the many letters in evidence which were addressed to her, and the manner in which she made and kept dates with other men clearly indicates to the Master that the defendant has forfeited her natural right to care for, raise and educate said children."

It will be noted that the finding of the master that defendant improperly consorted and associated with men other than her husband was predicated both on the testimony of the witnesses produced on the hearing and the aforementioned letters which were received in evidence but are not contained in the record before



us. These letters were considered by the master and the chancellor when they determined that defendant was guilty of improper conduct with men other than her husband. The rule is well settled that a reviewing court cannot pass upon the question as to whether a decree is against the manifest weight of the evidence unless all of the evidence is before such court and, where the record itself discloses that it does not contain all the evidence, it is conclusively presumed that there was sufficient evidence to warrant and sustain the decree. (Kennard v. Curran, 239 Ill. 122; McKenna v. Mickelberry, 242 Ill. 117; Bedinger v. May, 323 Ill. 187; Seifert v. Demaree, 380 Ill. 283.)

While the letters are not included in the record, excerpts from two of them are set forth in plaintiff's brief. One of such letters received by defendant from Joe Staveland reads in part as follows:

"Sweetheart:

Two-thirty A.M. Friday and silence reigns supreme here and all through the neighborhood. It's so quiet, in fact, it almost scares me but that's because you aren't near me.

I have just been looking out the window and the moon that was shining down upon us (you & I) a few short hours ago is still shining beautifully (reminding me of you) and lighting up the entire landscape. * * *

I love you sweetheart, Goodnight."

The other letter was received by defendant from one Ed Tross, and it reads in part as follows:

"Dear Honey --

It was sure good to see you yesterday. * * * Back to telling you how good it was to see you again. To look at you no one would have known what you went through. I just wish no one was in the room yesterday so I could put my arms around you if only for three mins. * * * Talk about seeing the baby I find myself wanting to see him very much. What do you mean who he looks like, you have me guessing please tell me what Dave say about who he looks like * * * Don't be afraid to write even if she does come here I don't care if

she knows it I love you I would like to shout it from the house-tops I love you dear and miss you very much. You can plan on seeing me Thursday * * * Love you is all I think of so I will tell you again I love you very much.

Love as always, Ed."

The foregoing letter written by Tross was received by defendant while she was still in the hospital recuperating after the birth of her youngest child and it was in response to a letter he had received from her. It is stated in plaintiff's brief that the balance of the 17 letters were of similar import and defendant filed no reply brief disputing this statement. The tenor of the letters to defendant from Staveland and Tross makes it readily apparent why the 17 letters were omitted from the record filed in this court in defendant's behalf.

Plaintiff also contends that the supplemental decree should be affirmed because the "abstract filed herein is totally and wholly insufficient." We think that there is merit in this contention but deem it unnecessary to discuss it.

A motion heretofore filed by plaintiff to dismiss this appeal was reserved to hearing. Having concluded that the supplemental decree must be affirmed because of defendant's failure to include material evidence in the record, it is unnecessary to consider said motion to dismiss.

The supplemental decree of the Superior court of Cook county is affirmed.

DECREE AFFIRMED.

Friend and Scanlan, JJ., concur.

44037

335 I.A. 645

PEOPLE OF THE STATE OF ILLINOIS
ex rel. HENRY E. MARSKI,
Appellee,

v.

ELLA WARD, EVELYN J. GOODEN,
MAMIE SMITH, ETHEL HAYNES and
ROSALIE McMULLEN,
Appellants.

APPEAL FROM COUNTY

COURT OF COOK

COUNTY.

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

An order was entered in the County court of Cook county granting Henry E. Marski, Assistant Chief Clerk of the Board of Election Commissioners of the City of Chicago, leave to file the following verified petition:

"* * *

"2. That on the 3rd day of June, 1946, an election was held in the City of Chicago, County and State as afore-said, for the election of judges of the Circuit and Superior Courts of Cook County, and also for certain propositions that were submitted to the electorate at said election.

"3. That at and during said election the following named persons hereinafter called the respondents, served in the election precinct known as the 30th precinct of the 5th ward of said City of Chicago, as judges and clerks of election, as indicated opposite their names:

| | |
|------------------|------------------|
| "Ella Ward | Republican Judge |
| Evelyn J. Gooden | Democratic Judge |
| Mamie Smith | Democratic Judge |
| Ethel Haynes | Republican Clerk |
| Rosalie McMullen | Democratic Clerk |

"4. That at and during said election each of the said respondents who served at said election misconducted and misbehaved himself as such judge or clerk of election, as more fully hereinafter appears, and that, as to each of said

respondents, his misconduct and misbehavior constituted, as your petitioner is advised, informed and believes, a contempt or contempts of this Honorable Court, said respondents being officers of the County Court.

"5. That petitioner is informed and believes that said respondents permitted applications to be presented and filed and ballots to be cast in the names of persons who did not personally appear at the polling place and vote in said June 3rd, 1946, election; permitted applications containing the forged signatures of voters to be presented and filed and ballots cast in the names of the same; made a false canvass and return of the votes cast.

"Wherefore your petitioner respectfully prays that an order and rule may be entered by this Honorable Court against each of aforesaid respondents, commanding him to be and appear in this court at a time to be designated in said order, then and there to show cause, if any he can, why he, as an officer of said court, should not be adjudged guilty of a contempt or contempts of this court for misconduct and misbehavior in office, and on account of the matters and things hereinbefore alleged."

Respondents were ruled to show cause why they should not be adjudged guilty of contempt and punished for the contempt, and writs of attachment were ordered issued against them. After a hearing upon the petition and answers a judgment order was entered that contained, inter alia, the following:

"That MAMIE SMITH served as Democratic Judge, EVELYN J. GOODEN served as Democratic Judge, ELLA WARD served as Republican Judge, ROSALIE McMULLEN served as Democratic Clerk and ETHEL HAYNES served as **Republican Clerk at the Elections**

held June 3, 1946, and as such were officers of the County Court of Cook County;

"THE COURT FURTHER FINDS, that the respondents, Mamie Smith, Evelyn J. Gooden, Ella Ward, Rosalie McMullen, and Ethel Haynes were guilty of misconduct, misbehavior in office as officers of the County Court in the conduct of the elections held June 3, 1946, in the 30th Precinct of the 5th Ward of the City of Chicago, County of Cook, Illinois; and the County Court further finds that the said respondents because of such misconduct and misbehavior in office as election officials of said precinct and ward, are guilty of contempt of the County Court of Cook County;

"IT IS ORDERED, that the respondent, Ethel Haynes, be fined in the sum of Twenty-five Dollars (\$25.00); that the said Ethel Haynes pay to the Clerk of this Court the sum of \$25.00 instanter and upon her failure or refusal to pay said fine of \$25.00, said Ethel Haynes is to stand committed to the County Jail of Cook County until said fine is paid or satisfied by the allowance of the sum of Two Dollars and Fifty Cents (\$2.50) for each day the said Ethel Haynes stands committed;

"IT IS FURTHER ORDERED, that the respondents, Mamie Smith and Rosalie McMullen, be committed to the Cook County Jail for a period of two (2) months each, and that the respondents, Evelyn J. Gooden and Ella Ward, be committed to the Cook County Jail for a period of three (3) months each;

"* * *"

Respondents appeal.

Respondents contend that "the evidence fails to prove respondents wilfully performed any wrongful act or

permitted any other person to perform a wrongful act," and that "unwarranted emphasis was placed on the testimony of the handwriting expert" by the trial court.

Rudolph B. Salmon, petitioner's handwriting expert, testified that after he had examined the signatures upon the application cards in the precinct and compared them with the signatures of the registered voters upon the binder cards he reached the conclusion that the signatures upon applications numbered 5, 15, 28, 36, 53, 58, 60, 62, 63, 67, 72, 73, 77, 78, 81, 82, 83, 84, 85, 90, 93, 95, 96, 99, 100, 101, 103, 104, 106, 107, 118, 124, 133, 135, 136, 142, 152, 156, 157, 212, 213, 214, 215, 216, 223, 224, 225, 227, 228 and 229 were not written by the persons whose names appear in the binder; that he compared each signature upon an application with the corresponding signature in the binder, and that he was of the opinion that the person who wrote the name on the binder card did not write the name on the application. Counsel for respondents did not cross-examine the expert.

Petitioner called as witnesses 23 registered voters of the precinct that the election returns showed had voted on June 3, 1946. Nineteen of them testified that they did not vote at the election. One of the 23 witnesses, Mrs. Lyle Lemons, testified that she did not vote because Mrs. Sandusky, precinct captain, told her that she did not have to vote, and that she, the witness, signed something in the basement of the home of Mrs. Sandusky. Mrs. Sandusky did not appear as a witness in the case. Sixteen of the 50 fraudulent applications bore the names of 16 voters who testified that they did not vote at the election. Several of the witnesses testified that they were out of town at the time of the election.

We have before us the 50 application cards that the

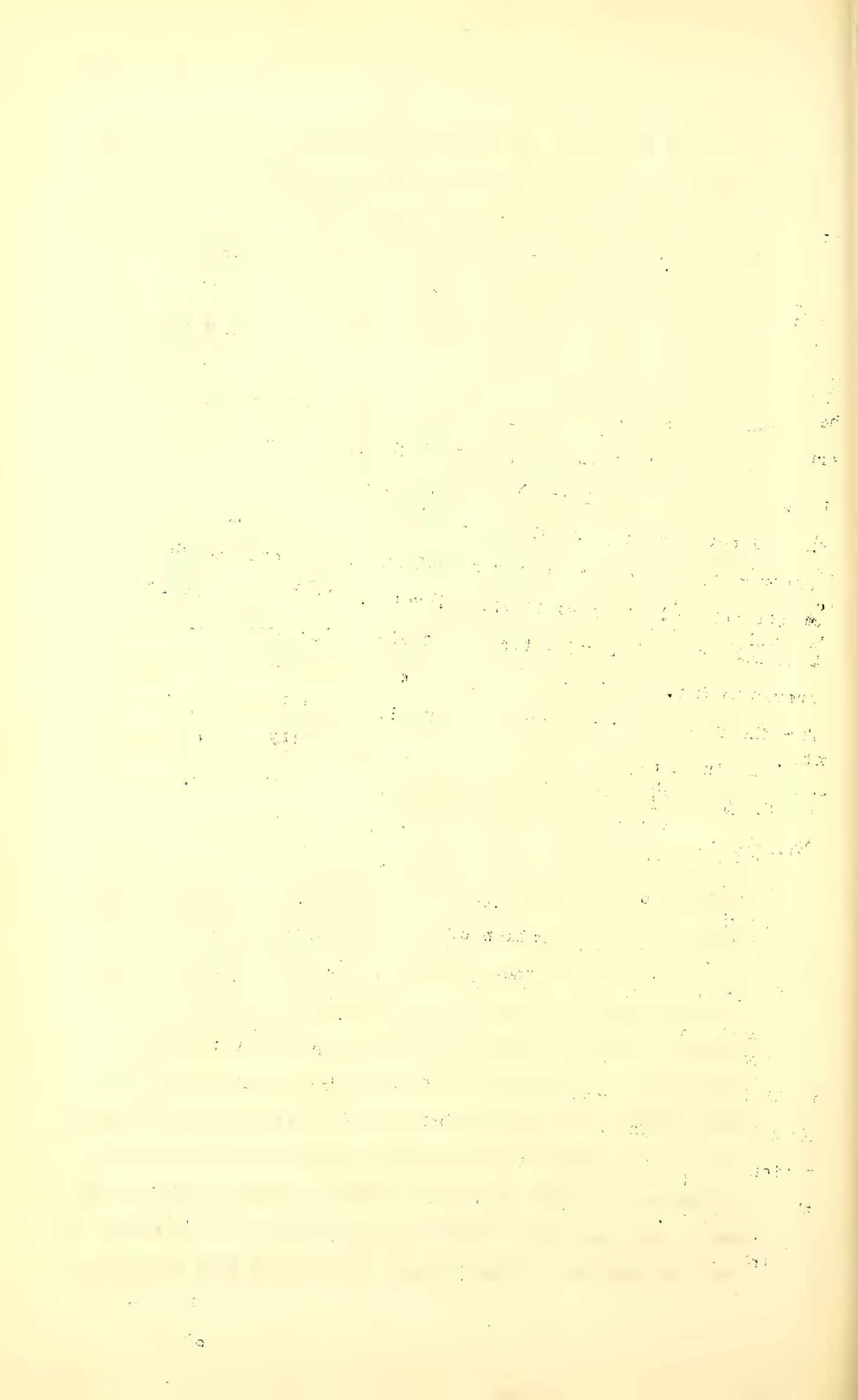
expert testified were forgeries and also the corresponding 50 signatures of the registered voters in the binder. After we had examined the signatures upon the 50 application cards and compared them with the corresponding signatures of the registered voters upon the binder cards we had no difficulty in reaching the conclusion that the signatures upon the 50 application cards were forgeries. The forgeries are so obvious that we can readily understand why counsel for respondents did not cross-examine the expert. It was not necessary for us to consider the testimony of the expert in reaching our conclusion. The persons who signed the 50 application cards made no effort to simulate the signatures of the registered voters. Any intelligent person with a reasonable knowledge of handwriting would readily detect the forgeries. In some cases the name of the registered voter is misspelled. In other cases the name of the registered voter is not correctly followed. To cite a few examples: Upon a binder card appears the name Virgil Giles Jr. Upon the application card the name appears, Virgie Giles Jr. Upon a binder card appears the name Julean Obanion. Upon the application card the name appears, "Julian O. Bannion." Upon a binder card appears the name Mable Du Vernay. Upon the application card the name appears, Mable "Deverney." Upon a binder card appears the name Brunette Westberry. Upon the application card the name appears, "Brunett Westburry." An inspection of the 50 application cards shows that respondent Ella Ward, Republican judge at the precinct, passed upon all of the 50 applications and approved the signatures upon them. Upon each of the 50 application cards appears the following: "Registration record checked by Ella Ward Judge of Election." The words "Ella Ward" are in the handwriting of respondent Ward. By education

and business experience she was especially qualified to pass upon the genuineness of the signatures upon the application cards. She was a graduate of one of our local high schools and she completed two years of a four-year term at college; she had worked as a clerk for two insurance companies; had worked for the Internal Revenue Department of the United States as a proof reader and in this employment part of her duties was to check signatures. Her handwriting shows that she is a skilled penman. She had worked as a judge of election several times before the election in question. Upon her direct examination she testified that she worked on the binder from A to L; that she was the registrar for the application blanks as the people came in, signed and voted; that when the people came in and gave their names and wrote their signatures she would compare the voter's signature with the name in the binder "from A to L." Upon cross-examination she testified that Evelyn J. Gooden, Democratic judge, had charge of the binder from M to Z. Also, upon cross-examination, she was shown the signatures upon certain application cards and the signatures of the registered voters in the binder and was questioned as to how she could have passed certain signatures upon the application cards, in view of her business experience. During the cross-examination the following occurred:

"A. Just a minute, Mr. Cashen [attorney for petitioner], during this election, previous to this [election], I have been very, very sick with pneumonia and I tried to get someone to work and I couldn't, so I came out to help the Board in order that they wouldn't get stuck. I really shouldn't have worked at that time. My sight was very bad, so maybe I did make some errors, I don't know. * * * maybe I did make some errors because my sight was bad, but I did

the best I could." She admitted that she did not ask to be excused from serving upon the day in question and that she worked constantly from the commencement of the election until the end; that she received the "supplies" the night before the election and brought them to the polling place in the morning. She performed services that she was not required to do as a judge of election. Her handwriting shows that she was not nervous, and the fact that she checked and approved the 50 forgeries proves that she was strong enough to aid criminals to cast 50 illegal votes. It is significant that all of the illegal voters had their applications approved by her. While she attempted to evade responsibility for the forgeries by stating that she had signed a few applications in blank, nevertheless, she did not testify that any of the 50 applications were signed by her in that manner. Indeed, she testified that she saw every person when they wrote their name upon an application and that she examined every signature that she O.K.'d.

A careful consideration of all of the evidence satisfies us that none of the other election officials had any knowledge of respondent Ward's misconduct. Respondent Mamie Smith was one of the Democratic judges at the election. She testified that she had nothing to do with the applications that day; that she never saw nor handled any of the applications; that she worked at the ballot box and initialed the ballots. The manner of the short cross-examination of this witness by petitioner's attorney indicates that counsel was of the opinion that respondent Smith was not connected in any way with the fraudulent voting. Evelyn J. Gooden was one of the Democratic judges at the election. None of the 50 applications were signed by her. She stated that respondent



Ward had charge of the A to L section of the binder and that she, the witness, had charge of the M to Z section; that she O.K.'d only 3 applications during the day. When this respondent was cross-examined as to certain of the forged applications she very pointedly referred the examiner to respondent Ward. We find nothing in the record to show that respondent Gooden was in any way connected with the 50 forged applications. Respondent Rosalie McMullen served as a Democratic clerk at the election. Her position did not require her to pass upon any of the applications. She testified that her sole duty on that day was to print the names on the applications after they were signed and then place the applications on the spindle in numerical order after the judges had compared the signatures; that she did not give out any applications because that was the duty of the judges; that the printing of the names of the voters was to help find the names easier in the binder. We find nothing in the record that connects this respondent with the 50 forged applications cards. Respondent Ethel Haynes served as a Republican clerk at the election. This was the first time she had served on an election board. She testified that she printed the names upon the application cards and placed them on the spindle; that she did not print the names plainly because she only reached the fifth grade in school; that she was a waitress; that she did not see anything wrong done and "if anything was wrong, it was above my head, I didn't see anything wrong." Counsel for petitioner plainly indicated to the trial court at the time respondents were sentenced that he did not think respondent Haynes was guilty of any wrong.

The evidence proves beyond all reasonable doubt

1. The first part of the document discusses the importance of maintaining accurate records of all transactions. It emphasizes that proper record-keeping is essential for the transparency and accountability of the organization. This section also outlines the various methods used to collect and analyze data, ensuring that the information is reliable and up-to-date.

2. The second part of the document focuses on the implementation of these practices across different departments. It provides a detailed overview of the roles and responsibilities of each team member, as well as the specific tasks they are required to perform. This section also includes a timeline for the completion of these tasks, ensuring that the project is completed on schedule.

3. The third part of the document discusses the challenges faced during the implementation process. It identifies the key areas where difficulties arose and provides a detailed analysis of the reasons behind these challenges. This section also includes a list of recommendations for how these challenges can be avoided in the future, ensuring that the project is completed successfully.

4. The fourth part of the document discusses the results of the implementation process. It provides a detailed overview of the progress made, as well as the specific outcomes achieved. This section also includes a list of recommendations for how the project can be improved in the future, ensuring that the organization is able to maintain its commitment to transparency and accountability.

5. The fifth part of the document discusses the future of the organization. It outlines the various goals and objectives that the organization is working towards, as well as the specific strategies that will be used to achieve these goals. This section also includes a list of recommendations for how the organization can continue to improve its performance, ensuring that it remains a leader in its field.

6. The sixth part of the document discusses the financial aspects of the project. It provides a detailed overview of the budget, as well as the specific costs incurred during the implementation process. This section also includes a list of recommendations for how the organization can manage its finances more effectively, ensuring that the project is completed within budget.

7. The seventh part of the document discusses the legal aspects of the project. It provides a detailed overview of the various laws and regulations that apply to the project, as well as the specific steps that have been taken to ensure compliance. This section also includes a list of recommendations for how the organization can continue to ensure compliance with these laws and regulations.

8. The eighth part of the document discusses the ethical aspects of the project. It provides a detailed overview of the various ethical issues that arise during the implementation process, as well as the specific steps that have been taken to address these issues. This section also includes a list of recommendations for how the organization can continue to ensure ethical behavior.

9. The ninth part of the document discusses the social aspects of the project. It provides a detailed overview of the various social issues that arise during the implementation process, as well as the specific steps that have been taken to address these issues. This section also includes a list of recommendations for how the organization can continue to ensure social responsibility.

10. The tenth part of the document discusses the environmental aspects of the project. It provides a detailed overview of the various environmental issues that arise during the implementation process, as well as the specific steps that have been taken to address these issues. This section also includes a list of recommendations for how the organization can continue to ensure environmental sustainability.

that respondent Ella Ward betrayed the trust reposed in her and aided and abetted a conspiracy that had for its object the placing of illegal ballots in the box. As we have often said, such a conspiracy is in its nature treasonable, for it strikes at the very life of the Republic. The punishment inflicted upon her by the trial court was wholly inadequate. We can find nothing in the record to warrant a finding that any of the other respondents aided and abetted her in permitting applications containing the forged signatures of voters to be presented and filed and ballots cast in the names of the voters.

While the petition charged that respondents "made a false canvass and return of the votes cast," and while certain of the respondents were cross-examined as to the canvass of the votes and return of the votes cast, it is clear that the judgments entered against the respondents were not entered upon that charge, nor does the counsel for petitioner make any effort in his brief to sustain the judgments entered upon that charge.

The judgment order of the County court of Cook county as to respondent Ella Ward is affirmed.

The judgment order of that court as to respondents Ethel Haynes, Mamie Smith, Rosalie McMullen and Evelyn J. Gooden is reversed.

JUDGMENT ORDER AS TO ELLA WARD AFFIRMED.

JUDGMENT ORDER AS TO ETHEL HAYNES,
MAMIE SMITH, ROSALIE McMULLEN AND
EVELYN J. GOODEN REVERSED.

Sullivan, P. J., and Friend, J., concur.

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III. UNPUBLISHED OPINIONS

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